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# 1901.

THE

# LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

## Supreme Court of Judicature.

CASES DETERMINED IN THE

# CHANCERY DIVISION

AND IN

# LUNACY,

AND ON APPEAL THEREFROM IN THE

# COURT OF APPEAL.

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1901.—VOL. II.

LONDON:
Printed and Published for the Council of Law Reporting
BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET, S.E., AND GREAT WINDMILL STREET, W.
PUBLISHING OFFICE, 7, FLEET STREET, E.C.

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| *Page* | *Line* | *For* | *Read* |
|---|---|---|---|
| 411 | 9 | laws | leases. |
| 688 | 11 | from foot, delete the full stop and read "on the circuit of the judges next after the passing of the Statute of Gloucester writs of right and quo warranto were issued," &c. | |

The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1, 1901, will be as follows:—

In the First Series,
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In the Second Series,
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In the Third Series,
[1901] A. C.

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# CASES

DETERMINED BY THE

# CHANCERY DIVISION

AND IN

# LUNACY

AND ON APPEAL THEREFROM IN THE

# COURT OF APPEAL.

## *In re* SIDEBOTTOM. BEELEY *v.* SIDEBOTTOM.

[1900 S. 912.]

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1901
BUCKLEY J.
*March* 26.
C. A.
*March* 26.
BUCKLEY J.
*March* 27.

*Charity — Mortmain — Real Estate — Devise — Sale — Extension of Time — Jurisdiction — Mortmain and Charitable Uses Act*, 1891 (54 & 55 *Vict. c.* 73), *ss.* 5, 6.

Where land has been devised to a charity, the Court has jurisdiction, under s. 5 of the Mortmain and Charitable Uses Act, 1891, when and so often as the circumstances render it desirable, to extend the time for sale beyond the year from the testator's death: and the power of granting an extension of time is not confined merely to an extension for the purpose of carrying into effect a contract for sale made within the year from the death.

Alfred Kershaw Sidebottom, who died in 1899, gave by his will certain real estate to the Ashton Infirmary. The executors sold a large portion of the property, but a considerable part of it remained unsold when the time—one year from the death of the testator—allowed by s. 5 of the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), was about to expire. An application was accordingly made to the Court by originating summons for an extension of the time, and, on March 26, 1900, a date within a year from the testator's death, an order was made, under s. 5 of the Act, by Stirling J. in

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chambers, on an originating summons taken out by the trustees of the infirmary, that the time for the sale of the lands not already agreed to be sold be extended for one year from the date of the order, and that the time for sale of the properties agreed to be sold but not completed be extended until June 30, 1900; and the rest of the said summons was to stand over generally; and any of the parties were to be at liberty to apply for further extension of time and generally as they might be advised.

It was found impossible to sell within the time limited by the order the remainder of the land which had not already been agreed to be sold, except at a great sacrifice, and therefore the trustees of the infirmary took out the present summons against the executors, asking that the time by the Mortmain and Charitable Uses Act, 1891 (s. 5), limited for sale of land assured by will to or for the benefit of any charitable use might be extended as to the lands remaining unsold for a further term of seven years.

The most important part of the unsold real estate consisted of freehold brickworks, known as the Manchester Road Brick Yard, with the farmhouse and buildings thereon and fields belonging thereto, containing altogether 16A. 1R. 10P. Several small pieces of this property had been sold since the testator's death as building land, and amongst other evidence a surveyor had made an affidavit in which he said: "The portion of the Droylsden estate of the said Alfred Kershaw Sidebottom, deceased, now remaining unsold, contains 15A. 2R. 7P. or thereabouts statute measure. The vacant plots of land portion of such estate which have been sold since the death of the said A. K. Sidebottom, deceased, have been sold in the aggregate after the rate of 602*l.* 17*s.* 7*d.* per statute acre. If this price were realized for the portion remaining unsold, the further sum of 9371*l.* would be received as purchase-money.

"In my opinion this price would approximately be realized if the land is gradually sold in small lots as the demand arises for building purposes. The plots referred to as having been sold are not more eligible for building purposes than are other parts of the estate, and the greater part of the land unsold is or will

be in course of time, as the estate is developed, equally suitable for building purposes.

"In my opinion, if a forced sale were made by auction at the present time of the estate as a whole, whether in one lot or otherwise, it is very doubtful whether the total price realized would exceed 2500*l*. It is only as that part of the land which is nearest the highway between Manchester and Ashton-under-Lyne, known as Manchester New Road, is laid out, built upon, and otherwise developed, that the part which is further away from the highway will become of marketable value.

"I consider that the most advantageous method of dealing with the estate is by retaining possession until a greater demand for building land arises, which will in the near future arise owing to better communication between the district and the adjoining towns."

The summons was heard by Buckley J. in Court on March 26, 1901, being the day on which the time fixed by the order of Stirling J. would expire.

*Astbury, K.C.*, and *S. O. Buckmaster*, for the trustees of the infirmary. The plaintiffs ask for an extension of the time for a sale, in order that the property may be sold gradually as building land. A considerable extension is desired for that purpose, even if the Court should be of opinion that seven years is too long. This course will be of great benefit to the charity.

[BUCKLEY J. Have I under the Mortmain and Charitable Uses Act, 1891, any right to take into consideration the fact that the beneficiaries will receive more if the time is extended?]

A great many orders of this kind have been made, and evidence that an extension of time will benefit the charity is always admitted on these applications. That this is the right practice is shewn by *In re Hume*. (1)

The object of the Act is to encourage gifts of land to charities and to satisfy the Mortmain Acts by directing that the land shall be sold, but s. 5 provides that it need not be sold at once. If the land is sold now it will be almost given away.

[BUCKLEY J. If it came under s. 6 it would have to be sold

(1) [1895] 1 Ch. 422.

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"with all reasonable speed," and it may be at a sacrifice. Why should not the same thing happen under s. 5?]

The persons in whose interest the Court is to act are the charities. The point has already been decided in this case by Stirling J., who has extended the time and given liberty to apply for a further extension. We might have made the application to the Charity Commissioners, and they would certainly have considered the interests of the infirmary.

*W. Baker*, for the defendants, supported the same contention.

BUCKLEY J. If I could find that Stirling J. or Lord Halsbury had laid down any principle on this point, I need scarcely say that I should be exceedingly grateful, and should gladly follow that decision. But I am sorry to say that I cannot do so. I do not think that I should be doing my duty if I sheltered myself behind the order of Stirling J.; which did not, I think, determine the point, and if I did not myself endeavour to put a construction upon the Act of Parliament. Stirling J. made an order in chambers extending the time limited for the sale of this land for one year, which expires to-day, and gave liberty to any of the parties to apply for a further extension, and I am now asked to grant a further extension for the term of seven years. [His Lordship stated the facts, and continued:—]

The short effect of the evidence before me is that if the land is sold by a forced sale by auction it would not realize more than 2500*l.*, and that if it is sold by degrees in plots it may realize as much as 9000*l.* [His Lordship read the affidavit of the surveyor.] He says as an expert that, by reason of the neighbourhood of Manchester, this land will increase in value very considerably. It appears that if the charity can be allowed to keep this land as a speculation—not using that word in any offensive sense—but in the expectation of improvement by nursing it, the charity will do better than if it is sold at once. The question is whether these are circumstances which enable me to grant a further extension of time.

I desire to express as plainly as I can what I think are the principles which ought to be applied to applications of this kind. The principle of the Act is that land which formerly

could not be given to a charity may now be so devised upon certain terms. Sect. 5 of the Mortmain and Charitable Uses Act, 1891, provides that "Land may be assured by will to or for the benefit of any charitable use, but, except as hereinafter provided, such land shall, notwithstanding anything in the will contained to the contrary, be sold within one year from the death of the testator, or such extended period as may be determined by the High Court, or any judge thereof sitting at chambers, or by the Charity Commissioners." Sect. 6 says: "So soon as the time limited for the sale of any lands under any such assurance shall have expired without completion of the sale of the land, the land unsold shall vest forthwith in the official trustee of charity lands, and the Charity Commissioners shall take all necessary steps for the sale or the completion of the sale of such land to be effected with all reasonable speed by the administering trustees for the time being thereof, and for this purpose the said Commissioners may make any order under their seal directing such trustees to proceed with the sale or completion of the sale of the said land or removing such trustees and appointing others. . . . ."

These being the provisions of the Act, I have to ask myself what is to guide me in determining whether to allow this extension of time or not: can I take into consideration as my guide in the matter the mere fact that it is for the benefit of the charity that it should keep the land till a larger sum is realized? I regret to say that I have come to the conclusion that I ought not to do so. In s. 6 there is a direction that the land shall be sold "with all reasonable speed," and the authority who are to see that it is sold "with all reasonable speed" are the Charity Commissioners. They are one of the authorities who under s. 5 can extend the time. I cannot think that they can with a view merely to the benefit of the charity extend the time under s. 5, when if s. 6 takes effect they have no discretion other than that to be implied from a direction to sell "with all reasonable speed." If a sale "with all reasonable speed" is the principle of s. 6, I do not know why in s. 5 the benefit to the charity is to prevail. If that were so, I should expect to find in s. 6 a direction that the Charity

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Commissioners shall have regard to the benefit of the charity; but it is not there.

It appears to me that the extension of time in s. 5 is to be an extension for the purpose of carrying out a sale, having regard to principles which are common to both s. 5 and s. 6. An extension under s. 5 might, for instance, be made to stop the vesting of the land under s. 6 when a contract has been made but not completed within the year from the testator's death. If trustees have secured a purchaser, but the sale cannot be completed within the year, the Court can extend the time so that, instead of the official trustee, the trustees themselves may complete the sale. But it does not, I think, mean an extension because the charity will be benefited. It means an extension only for the purpose of a sale within the year, or "with all reasonable speed" after the year. If that is so, I cannot regard the benefit of the charity as the object to be considered. In this case, if I refuse to extend the time, the result will be that the land will pass to the official trustee, and it will be his duty to sell it "with all reasonable speed." There are means of speedily putting this right if my decision is wrong. I refuse to grant the extension of time.

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On the same day the plaintiffs, the trustees of the infirmary, made, by way of appeal from that decision, a special application to the Court of Appeal for a further extension of time under s. 5 of the above Act, the application being made a few minutes before the usual time for the rising of the Court, on the ground of urgency, since, if the one year's extension granted by the order of Stirling J. were allowed to expire that day, the title of the applicants to the lands in question would, under s. 6, immediately pass to the official trustee of charity lands.

*Astbury, K.C.*, and *S. O. Buckmaster*, for the applicants. We submit that the learned judge's view of the Act is erroneous, and that the Court has power under s. 5 to grant an extension of time as often as the interests of the charity may require it. The question the Court has mainly to consider is, When and how is it for the benefit of the charity that the land devised to

it shall be sold? The intention of the Legislature is that the vesting of the land in the official trustee shall not arise until the expiration of the time limited for sale and the Court has arrived at the conclusion that the land ought to be sold. That the Court has power to extend the time for sale whenever it thinks proper seems to be the opinion of Lord Halsbury in *In re Hume* (1), for, after observing that the policy of the law, as exhibited by the Act, is that land devised to a charity shall no longer be inalienable, he says: "On the contrary, it is one of the conditions of the validity of the disposition that the land shall be turned into personalty within a year, subject to the power to apply to have the sale put off if the facts should render it desirable." Here the evidence clearly shews that a postponement of the time for immediate sale is desirable in the interests of the charity, which would be seriously prejudiced by a forced sale.

*W. Baker*, for the defendants, the executors.

RIGBY L.J. We make an order extending the time for one month, with liberty to apply to the judge to extend it still further if he thinks fit to do so.

*Astbury, K.C.* Will your Lordships say that you have jurisdiction to grant an extension of time?

RIGBY L.J. Of course we cannot make the order if we have no jurisdiction to do so.

VAUGHAN WILLIAMS and STIRLING L.JJ. concurred.

G. I. F. C.

March 27. The case was mentioned to Buckley J., and his Lordship said that, having been informed of the views of the Court of Appeal, he would give an extension of time for one year from the expiration of the order of Stirling J., namely, an extension till March 26, 1902.

Solicitors: *Woodcock Ryland & Parker, for Leonard Bottomley, Ashton-under-Lyne; Bower, Cotton & Bower, for W. H. Vaudrey, Manchester.*

(1) [1895] 1 Ch. 422, 434. H. C. R.

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*March* 13.

## *In re* KNOTT END RAILWAY ACT, 1898.

[1900 K. 0115.]

*Railway Company—Judgment Creditor—Appointment of Receiver—Jurisdiction—Railway not open for Public Traffic—Discretion—Railway Companies Act*, 1867 (30 & 31 *Vict. c.* 127), *s.* 4.

*Per* Farwell J.: Under s. 4 of the Railway Companies Act, 1867, the Court has jurisdiction to appoint a receiver of the undertaking of a railway company, even though the railway is not yet open for public traffic.

*Per* the C. A.: Without deciding that there is jurisdiction to appoint a receiver in such a case, but assuming that there is jurisdiction, still a receiver ought not to be appointed when there is not, and probably will not, until the line is opened for traffic, be any money for him to receive.

*Per* Rigby L.J. (Vaughan Williams L.J. doubting): Even if a receiver were appointed before the railway was open for public traffic, the Court would probably give a judgment creditor leave to levy execution on chattels of the company, notwithstanding the appointment.

*In re Manchester and Milford Ry. Co.*, (1880) 14 Ch. D. 645, explained.

Petition by judgment creditors, under s. 4 of the Railway Companies Act, 1867, for the appointment of a receiver of the undertaking of the above railway company.

The company was incorporated by the Knott End Railway Act, 1898 (61 & 62 Vict. c. ccxliv.), for the purpose of making a light railway between Knott End and Pilling, in Lancashire, and for other purposes.

The Act provided, inter alia (s. 6), that the railway should be constructed and worked as a light railway subject to the provisions of Part V. of the Regulation of Railways Act, 1868; (s. 8) that the capital of the company should be 50,000*l.* in 10,000 shares of 5*l.* each; and (s. 42) that, if the railway should not be completed within five years from August 12, 1898, the powers granted by the Act should cease, except as to so much thereof as should be then completed.

The whole of the authorized capital was offered for subscription, but only 1171 shares were subscribed for. The total amount paid upon those shares was 5835*l.* or thereabouts. Under an agreement dated November 4, 1898, and made between the company and Robert Worthington, a contractor,

the contractor agreed to construct and complete the railway and works authorized by the Act for the sum of 34,000*l.*, and by a supplemental agreement dated November 22, 1898, the consideration payable to the contractor was to be paid as to 6000*l.* in cash, and as to 28,000*l.* in fully paid shares of the company. Pursuant to this contract, 1014 shares had been allotted to the contractor or his nominees as fully paid up.

The company proceeded to purchase land and to construct the railway and works authorized by the Act, but the railway had not yet been completed. The permanent way had been formed and fenced, but no rails had yet been laid. The land for the station at Knott End had not yet been acquired, and some purchases of other land for the permanent way had not yet been completed.

The petitioners, the Manchester and County Bank, on August 15, 1900, recovered a judgment against the company for the sum of 2982*l.* 15*s.* debt, and 7*l.* 10*s.* for costs, in the Queen's Bench Division. This judgment was still in force and unsatisfied. The company had no assets or property upon which legal execution could be levied.

The petition prayed that a receiver of the property and undertaking of the company might be appointed, and that, out of the moneys which might come to his hands and properly applicable for that purpose, the amount due to the petitioners by virtue of their judgment might be paid to them, and that for this purpose all proper directions might be given, accounts taken, and inquiries made.

Another judgment creditor of the company had levied execution and had seized and sold 250 tons of rails which had been brought by the contractor upon the works, and had under the provisions of the contract with him become the property of the company. This judgment remained partly unsatisfied, there being no property of the company remaining which could be taken in execution. No sleepers or rails could be brought on the land without risk of their being immediately taken in execution by judgment creditors.

The petition came on for hearing before Farwell J. on January 26, 1901.

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*J. Eldon Bankes* and *Maugham*, for the petitioners. The two clauses of s. 4 (1) being independent of each other—*In re Manchester and Milford Ry. Co.* (2)—the Court has jurisdiction to appoint a receiver under the second clause, although the railway is not open for public traffic, that condition applying only to the first clause. The object of the section is explained in *In re East and West India Dock Co.* (3) The company having commenced the construction of the railway, there is an undertaking within the second clause: *Midland Waggon Co.* v. *Potteries, Shrewsbury and North Wales Ry. Co.* (4) If it had done nothing, there would be no undertaking: *In re Birmingham and Lichfield Junction Ry. Co.* (5)

*Mark Romer*, for a shareholder supporting the petition, adopted the same arguments.

*Martelli*, for the company. Sect. 4 does not apply unless the railway has been opened for public traffic: *In re Beddgelert Ry. Co.* (6) Here there is not even an "undertaking" within the section, as "undertaking" means "the completed work"

(1) Sect. 4: "The engines, tenders, carriages, trucks, machinery, tools, fittings, materials, and effects, constituting the rolling stock and plant used or provided by a company for the purposes of the traffic on their railway, or of their stations or workshops, shall not, after their railway or any part thereof is open for public traffic, be liable to be taken in execution at law or in equity at any time after the passing of this Act, and before the first day of September 1868, where the judgment on which execution issues is recovered in an action on a contract entered into after the passing of this Act, or in an action not on a contract commenced after the passing of this Act; *but* the person who has recovered any such judgment may obtain the appointment of a receiver, and, if necessary, of a manager, of the undertaking of the company, on application by petition in a summary way to the Court of Chancery in England or in Ireland, according to the situation of the railway of the company; and all money received by such receiver or manager shall, after due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking, be applied and distributed under the direction of the Court in payment of the debts of the company and otherwise according to the rights and priorities of the persons for the time being interested therein; and on payment of the amount due to every such judgment creditor as aforesaid the Court may, if it think fit, discharge such receiver or such receiver and manager."

This Act was made perpetual by 38 & 39 Vict. c. 31.

(2) 14 Ch. D. 645, 651.

(3) (1888) 38 Ch. D. 576, 595.

(4) (1880) 6 Q. B. D. 36.

(5) (1881) 18 Ch. D. 155.

(6) (1871) 19 W. R. 427.

which has become "a fruit-bearing tree": *Gardner* v. *London, Chatham and Dover Ry. Co.* (1) *Midland Waggon Co.* v. *Potteries Ry. Co.* (2) only decides that a temporary cessation of traffic does not stop the operation of the section. In *In re Manchester and Milford Ry. Co.* (3) Jessel M.R. merely meant that the section was applicable, although the company, whose railway was in fact open for traffic, had no rolling stock to be taken in execution. The railway must be a going concern: Browne and Theobald on Railways, 3rd ed. p. 577.

*W. E. Vernon*, for the contractor, who was also a shareholder and an unsecured creditor. There is nothing for the receiver to receive. His appointment would stop my financial arrangements for finishing the line, and would not benefit the petitioners. The application should therefore be refused: *In re Southern Ry. Co.* (4); *In re Waterford, Dungarvan and Lismore Ry. Co.* (5)

*J. Eldon Bankes*, in reply. The appointment will protect rails and other plant brought on to the property from seizure, and enable the line to be completed. It will be for the benefit of all the creditors, and will not give the petitioners any priority: *In re Mersey Ry. Co.* (6) The Court is really administering the undertaking for the benefit of all persons interested.

Jan. 29. FARWELL J. This is a petition under s. 4 of the Railway Companies Act, 1867, asking for the appointment of a receiver of the undertaking of the Knott End Railway Company. The railway company is stated in the petition to have acquired certain lands and hereditaments, and the railway has been partly constructed, but has not yet been completed. The permanent way has been formed and banked, but no rails have yet been laid, the fact being that the company, or the contractor, found that the rails were seized by judgment creditors of the company as soon as they were brought upon the line. The contractor attributes the delay to this cause. It is stated in the evidence, and it seems to be reasonably apparent, that

(1) (1867) L. R. 2 Ch. 201, 217.
(2) 6 Q. B. D. 36.
(3) 14 Ch. D. 645, 651.
(4) (1880) 5 L. R. Ir. 165, 168.
(5) (1880) 5 L. R. Ir. 584.
(6) (1888) 37 Ch. D. 610.

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the railway will never be completed if every time the rails are brought on the property they are to be seized by the creditors.

Now, two questions have been argued, one as to the jurisdiction and the other as to the discretion of the Court. It was argued that the Court has no jurisdiction to appoint a receiver under this section, unless the railway has been opened for public traffic, or, at any rate, completed, though I do not quite understand why the second point was argued. On this question I have the clear and conclusive authority of the Court of Appeal in *In re Manchester and Milford Ry. Co.* (1) The Court of Appeal there held that this section, although containing two clauses united by the word "but," contains, in fact, two separate and independent clauses, and that the remedy given by the latter clause is not a mere substitution of another remedy in the place of the remedy taken away, but that it is entirely a new right given to all judgment creditors of railway companies. That being so, I regard the clauses as two different sections. I have nothing to do with the first clause, which deals with the protection of rolling stock, and gives protection only after the railway is open for public traffic, as the Court of Appeal say that the second clause is an entirely independent enactment and is to be treated as a separate section, and that a judgment creditor is entitled to the appointment of a receiver. For the purpose, therefore, of the second clause, I have merely to be satisfied that there is an undertaking. The opening of the railway for public traffic has nothing whatever to do with this clause.

In *In re Manchester and Milford Ry. Co.* (1) the Court held that so long as there was an undertaking there might be an appointment of a receiver although there was no rolling stock to protect, because it might be worked by another line, or the rolling stock might belong to some other person.

In *In re Birmingham and Lichfield Junction Ry. Co.* (2) Jessel M.R. held that a company which had never commenced to acquire lands or construct the railway was not an undertaking. It was an application for the appointment of a receiver of the parliamentary deposit, and the company had done

(1) 14 Ch. D. 645, 651. (2) 18 Ch. D. 155.

nothing at all. There was, in fact, no undertaking, and therefore the Court refused to appoint a receiver. It is obvious, to my mind, that the word "undertaking" is something very much wider than the mere railway which carries the rolling stock protected by the first clause. For example, in *In re East and West India Dock Co.* (1) the railway was a very small part of the undertaking of the East and West India Dock Company, but the Court of Appeal, affirming the decision of Chitty J., appointed a receiver of the whole undertaking. In the present case I have to be satisfied that there is an undertaking. Before I pass to that I ought to say that in my opinion the second reason given by Stuart V.-C. for his decision in *In re Beddgelert Ry. Co.* (2), namely, that the line had not been opened for public traffic, is inconsistent with the decision of the Court of Appeal in *In re Manchester and Milford Ry. Co.* (3), and I cannot rely on it as an authority.

Now, the word "undertaking" has been defined by Lord Cairns, among others, in the case of *Gardner* v. *London, Chatham and Dover Ry. Co.* (4) He says: "Whatever may be the liability to which any of the property or effects connected with it may be subjected through the legal operation and consequences of a judgment recovered against it, the undertaking, so far as these contracts of mortgage are concerned, is, in my opinion, made over as a thing complete or to be completed; as a going concern, with internal and parliamentary powers of management not to be interfered with; as a fruit-bearing tree, the produce of which is the fund dedicated by the contract to secure and to pay the debt. The living and going concern thus created by the Legislature must not, under a contract pledging it as security, be destroyed, broken up, or annihilated. The tolls and sums of money ejusdem generis—that is to say, the earnings of the undertaking—must be made available to satisfy the mortgage; but, in my opinion, the mortgagees cannot, under their mortgages, or as mortgagees—by seizing, or calling on this Court to seize, the capital, or the lands, or the proceeds of sale of land, or the stock of the undertaking—either prevent its

(1) 38 Ch. D. 576.
(2) 19 W. R. 427.
(3) 14 Ch. D. 645, 651.
(4) L. R. 2 Ch. 201, 217.

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completion, or reduce it into its original elements when it has been completed." It is obvious, therefore, that Lord Cairns, in considering the question of mortgagees or debenture-holders claiming a charge on the undertaking, thought that the undertaking meant the undertaking of the railway completed or to be completed. That must be read subject to the qualification introduced by *In re Birmingham and Lichfield Junction Ry. Co.* (1), namely, that the undertaking must at any rate have been commenced. The meaning of the section is to be found, I think, in the reasons for the passing of the Act stated by Fry L.J. in *In re East and West India Dock Co.* (2), where he says: "The statute was intended to prevent the seizure of rolling stock of a railway company by persons who had obtained judgments against the company. The result of such seizure was detrimental in two ways. In the first place, it rendered it impossible, or very difficult, to carry on the working of the railway, in which the public were very largely interested, and, in the second place, it enabled a creditor to cause an irremediable injury to the company itself and to all the other creditors of the company." Of course his Lordship is simply referring to the seizure of rolling stock, but that reason applies equally to the breaking up of the undertaking. I would also add that in my judgment the rights of landowners whose lands have been taken compulsorily have also some weight with the Court, because the Legislature has interfered with the ordinary rights of property by compelling landowners to sell their land and allowing public highways to be interfered with and so on for the purpose of a railway, and on the footing that a railway is going to be made when the land has been taken. There is no evidence before me that a public highway has been interfered with, but, for the sake of argument, I will assume it has been. When land has been taken and public highways interfered with, the rights of the landowner and the public then come into consideration, because they have been displaced. From that point of view the statute is intended to have a general protecting power, in order to carry out the paramount intention of Parliament that if the land is taken the railway should be

(1) 18 Ch. D. 155. (2) 38 Ch. D. 576, 595.

made, and, if made, worked, and that the creditors should have the benefit of the working of the railway which is to be made for the benefit of all. In my opinion, therefore, there is in the present case an undertaking within the meaning of the second clause of the section.

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The only other question is whether, in the exercise of the discretion of the Court, I ought to appoint a receiver. I feel some little doubt whether it will serve any useful purpose, but it is certainly open to argument that under the second clause of the section the Court, if necessary, undertakes the administration and management of the railway, and does so on the terms of distributing the proceeds equally among the creditors. It may, therefore, be fairly argued that the Court should not allow a creditor to interfere with the possession of the receiver and seize any part of the undertaking, even although the part seized may not be of such a nature as to be within the first clause giving protection to rolling stock, or would not be within that clause because it has not yet come into operation. I think it might be contended that in *In re East and West India Dock Co.* (1) the Court would have refused to allow a creditor to take in execution any portion of the dock company's undertaking, although it was not part of the railway, seeing that it appointed a receiver of the whole undertaking for the purpose of administering it for the benefit of all. Without, however, expressing any final opinion on this point, which has not been argued on behalf of the general body of creditors, who are the persons most interested, I think I ought to exercise my discretion in this case by appointing a receiver. The point can more conveniently be argued when a judgment creditor applies for leave to issue execution.

G. R. A.

The company appealed. The appeal was heard on March 13, 1901. C. A.

*Phipson Beale, K.C.*, and *Martelli*, for the company, repeated

(1) 38 Ch. D. 576, 595.

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the arguments which had been adduced by them in the Court below, and cited the same cases.

They also urged that, as s. 4 does not deprive judgment creditors of the right to levy execution, when the railway is not open for traffic, the effect of the appointment of a receiver would be to give such a creditor a new remedy, in addition to his remedy by execution.

*Maugham* (*Eldon Bankes, K.C.*, with him), for the petitioners, used the same arguments as had been used in the Court below.

*Phipson Beale, K.C.*, in reply.

RIGBY L.J. This case raises an important question as to the construction of s. 4 of the Railway Companies Act, 1867, and as to the duty of the Court under it. On the present occasion, and for the purpose of this application, I think it is not necessary to lay down any final or complete rule as to the jurisdiction conferred on the Court by s. 4 under all circumstances. It appears to me sufficient to say, that, under the existing circumstances of the present case, I can see nothing to justify the appointment of a receiver. Subject to what I have said as to not laying down any final rule, it is necessary to consider the terms of s. 4, and the objects with which it was passed. We all know that the holders of debentures of a railway company were subject to some restrictions and limitations to which the general creditors were not subject. A general creditor, who had recovered judgment against a railway company for his debt, could levy execution and seize the rolling stock and plant of the company. The first part of s. 4 prohibits the taking in execution of the rolling stock and plant of a railway company "after their railway or any part thereof is open for public traffic," but it leaves the remedies of the creditors before the railway is opened entirely unaffected. Whatever power they had before the Act to seize the company's chattels they still retain. Then the second part of the section gives a new remedy in place of that which is taken away by the first part, namely, the appointment by the Court of a receiver, and, if necessary, of a manager, of the undertaking of the company, on

the application of a judgment creditor. In the present case an application was made by judgment creditors of the company for the appointment of a receiver. What are the duties of a receiver appointed under this section? He has to receive the profits of the company as a going concern, and to apply them, under the direction of the Court, in payment of the debts of the company. It is not suggested that there are in the present case any outstanding debts due to the company or any income which the receiver would be entitled to receive. All that he could receive would be the profits of the railway as a going concern when it is open for traffic. If there were nothing else to be considered I should have thought the meaning was clear, that a receiver ought not to be appointed until the railway is open, or is on the point of being opened, for public traffic, because under those circumstances only would the appointment of a receiver be efficacious. But it has been argued that, though the two clauses of s. 4—the first which restricts the right of a creditor to levy execution, and the second, beginning with the word "but," which confers the power to appoint a receiver—are parts of one section, they are wholly independent of each other, and should be treated as if they were two distinct sections, and the judgment of Jessel M.R. in *In re Manchester and Milford Ry. Co.* (1) is cited as an authority in support of this view. I entirely dissent from it. No Court can by its finding alter facts; it cannot make one section two. But, in my opinion, that judgment has no such effect as has been attributed to it. No doubt in that case Jessel M.R. (2) described the new right given by the latter part of s. 4 as "wholly independent of the fact that the railway company had or had not rolling stock to be taken in execution," and as "an entirely new right given to all judgment creditors of railway companies." But what were the facts of that case? The railway had been opened for traffic, and the Court was asked to appoint a manager of the undertaking. The appointment was objected to apparently on the ground that the petitioner had not been deprived of any right by the first part of s. 4. The Court said that the second part of the section

(1) 14 Ch. D. 645. (2) 14 Ch. D. 651.

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applied, notwithstanding that the company had no rolling stock which could be taken in execution. But I think no one would have been more astonished than the learned judges who decided that case if they had been told that their language was to be wrested from its context and from the facts to which it applied, and to be interpreted as saying that the two parts of the section must be treated as two sections which have no relation to each other. All that the learned judges meant to say, I think, was this—that it was not necessary for a creditor to shew that he had been deprived of a special or particular right by the first part of the section before he could have the benefit of the new general right which is conferred by the second part. I must not be understood as saying that there is jurisdiction under s. 4 to appoint a receiver, if the railway is not open, or about to be opened, for traffic. I think there is reasonable ground for contending that the words which restrict the rights of judgment creditors after the railway is open for traffic apply equally to the appointment of a receiver. But what I do say is this—that, whether there is jurisdiction or not, it would not be right, or in accordance with the practice of the Court, to appoint a receiver who in all probability would not have any duties to perform for some considerable time, and perhaps none at all, if the railway is never opened for traffic. This alone is a sufficient ground for saying that a receiver ought not to be appointed in the present case. I cannot see that there would be anything for him to do until the railway is opened for traffic. And, indeed, my present view is that any judgment creditor of the company, who, but for the appointment of a receiver, would have been entitled to seize any chattels belonging to the company, would be able by an application pro interesse suo to obtain leave from the Court to seize those chattels, notwithstanding the appointment of a receiver. The only reason why such a creditor must obtain the leave of the Court is that he must not interfere with the officer of the Court without that leave. The rights of a judgment creditor are not affected by s. 4 until the railway is open for traffic. If a receiver were in fact appointed and put in possession of chattels of the company, the Court would, I think, on the

application of a judgment creditor, order the receiver to relinquish possession. Under these circumstances I cannot see any use in appointing a receiver in the present case, and it would be contrary to the practice of the Court to do so. In my opinion the order ought to be discharged.

VAUGHAN WILLIAMS L.J. I assent, for I understand that, according to the practice of the Courts of Equity, it would not be usual under the circumstances of the present case to appoint a receiver who would have no functions which he could usefully perform. I have not sufficient knowledge of the practice to enable me to form an independent judgment, and therefore I think I am right in accepting the view of my learned brethren, who are familiar with the practice, that the order ought to be discharged. But I think it is right that I should say a few words about the construction of s. 4. That section is divided into two parts. The first part is for the protection of the rolling stock and plant provided by a railway company for its traffic, and the protection is given by depriving individual judgment creditors of the right of taking the rolling stock and plant in execution, either at law or in equity. It is quite plain from the express words of the section that this protection does not arise, and that the right to levy execution is not taken away, until there is public traffic on the railway. Everything in the first part of the section is governed by the words "after their railway or any part thereof is open for public traffic." The right of individual creditors to levy execution having been thus taken away, the second part of the section goes on to give a new right, not to the individual creditor, but to the creditors in general. It is not a substituted right given to individual creditors, but any judgment creditor may obtain the appointment of a receiver. I understand the language of Jessel M.R. in *In re Manchester and Milford Ry. Co.* (1) in exactly the same sense as does my brother Rigby L.J., namely, as meaning that the right which is conferred is a new right, and is independent of the exercise of the creditor's old right. From the first part of the section we see at once that the right of execution which

(1) 14 Ch. D. 645, 651.

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is taken away is limited to a comparatively small subject-matter, whereas the new right conferred by the second part of the section applies to a much larger and wider subject-matter. For instance, the first part of the section does not take away any right of execution upon surplus lands of the company, whereas a receivership order would include surplus lands. Taking this view of the section, the next question is, whether there is jurisdiction to appoint a receiver in the present case. I do not think it is necessary to say more than that I must not be taken as expressing any opinion that no order for the appointment of a receiver can be made under the latter part of the section until the railway is open for traffic. But, assuming for the present purpose that there is jurisdiction before there is traffic on the railway, I will consider whether, apart from the practice of the Courts of Equity, the order would be a useless one, because, notwithstanding the making of the order, the rights of individual judgment creditors continue until there is traffic on the railway. In my judgment, if it is true that the new remedy is a remedy for all the creditors, it would seem to follow that, the moment the new remedy is put in force, the rights of individual creditors would be suspended, not because they are taken away by the express words of the first part of the section, but because they are superseded by the new remedy, which operates as an execution for the benefit of the whole class of creditors instead of individual creditors only. Could it be said for a moment that, supposing traffic on the railway had commenced, and the company had property liable to execution, for instance, surplus lands, a judgment creditor could, after the appointment of a receiver under the second part of s. 4, issue an elegit against the surplus lands, because there is nothing in the first part of s. 4 to take away his rights? In my view, if it is true that the appointment of a receiver is for the benefit of a class of creditors, no member of the class ought to be allowed to exercise his individual right. It is, however, as I understand, not according to the practice of the Court to appoint a receiver unless there is an immediate prospect of there being something for him to receive, and it may be that it would not be his duty to protect the property of the company.

But, speaking for myself, I am by no means satisfied that there is no jurisdiction under s. 4 to appoint a receiver until the railway is open for traffic, and I am by no means satisfied that, if a receiver were appointed before traffic had begun, it would be possible for a judgment creditor to proceed with his execution notwithstanding the appointment.

STIRLING L.J. I am of the same opinion. I need not add anything about the construction of s. 4, and I will assume that there is jurisdiction in this case to appoint a receiver. But what is it that a receiver when appointed has to do? Sect. 4 says that all money received by him "shall, after due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking, be applied and distributed under the direction of the Court in payment of the debts of the company and otherwise according to the rights and priorities of the persons for the time being interested therein." That, I think, shews that the view of the Legislature was, that the receiver when in possession of the railway would work it to a profit, so that the surplus earnings would go to pay the creditors. In the present case there is a railway which is far from completion; there is nothing for the receiver to distribute, or even to receive, in the shape of money. It has not been suggested that there are any outstanding debts or other moneys which he could receive. That being so, the first thing he would have to do would be to complete the railway, so that it might become a going concern. From what source are the funds for that purpose to come? The petitioning creditors are not prepared to undertake to supply them, so that it must be left to the company or to the contractor to find the money. I should in any case be very loth to appoint a receiver when there was nothing for him to do. But in this case I think the appointment of a receiver would be an obstacle to the completion of the line. The circumstances are peculiar. The contractor, who is to be paid partly in cash and partly in shares, has a strong interest in the completion of the line. A judgment creditor, in the exercise of his undoubted legal rights, has seized some rails which had been brought upon the

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company's land, and which, under the agreement between the company and the contractor, had become the property of the company, and since then the contractor has not unnaturally held his hand. If, however, the contractor and the company were left free to make their own arrangements, it is not improbable that this difficulty might be surmounted. In these circumstances I think the appointment of a receiver would not tend to bring about the completion of the line, and I can see no use in making an appointment which would probably be an obstacle to its completion. I think, therefore, that this is not a case in which the jurisdiction, if it exists, should be exercised. And, if authority were needed in support of this view, I find it in the observations of Cotton L.J., in *In re East and West India Dock Co.* (1), where he said: "The Act does not require the Court to make an order, but only gives the Court power to make an order if the company is a company coming within that definition. If therefore the dock company had not made the railway, although it would still be within the definition, yet the Court if asked to make an order under this Act might say: 'The company may be within the definition, but we are not compelled to make an order, and under the circumstances of the case we shall not make an order.'"

Solicitors: *Ashurst, Morris, Crisp & Co.; Rowcliffes, Rawle & Co., for Houghton, Myres & Reveley, Preston.*

(1) 38 Ch. D. 592.

W. L. C.

## BURROWS *v.* MATABELE GOLD REEFS AND ESTATES COMPANY, LIMITED.

C. A.
1901
FARWELL J.
*Feb.* 26.
C. A.
*March* 20, 21.

[1901 B. 548.]

*Company—Issue of Shares—Payment of Commission for placing Shares—Underwriting Agreement—Option to Underwriters to take other Shares—Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *s.* 8.

A company, proposing to issue 80,000 unissued 1*l.* shares, offered them to the existing shareholders at the price of 2*l.* 10*s.* per share. The company also entered into an agreement with some persons who thereby agreed to underwrite or guarantee the subscription for 60,000 of the 80,000 shares at the issue price, in consideration of an option given to the underwriters to subscribe for and have allotted to them 15,000 other unissued shares of the company at the price of 2*l.* 10*s.* per share. At this time the market price of the company's shares exceeded 2*l.* 10*s.* The company's articles of association authorized the payment of commission for obtaining applications for or placing shares, but did not, as required by sub-s. 1 of s. 8 of the Companies Act, 1900, mention any amount or rate per cent. of commission:—

*Held*, that this agreement involved an application of 15,000 shares in payment of commission for subscribing or agreeing to subscribe for shares of the company, within the meaning of sub-s. 2 of s. 8, and was therefore invalid under that sub-section.

An injunction was accordingly granted, at the instance of a shareholder, to restrain the company from carrying out the agreement.

Decision of Farwell J. affirmed.

Motion on behalf of the plaintiff for an injunction to restrain the defendant company from acting upon an underwriting agreement relating to a proposed issue of shares in the company.

The company was incorporated with limited liability by registration under the Companies Act, 1862, in March, 1899. The capital was 500,000*l.*, in shares of 1*l.* each, of which 387,030 shares had been issued.

The articles of association contained the following clauses:—

"4. The shares of the original capital of the company may be allotted, or otherwise disposed of, to such persons, and for such consideration, and upon such terms and conditions as the board may determine, and they may make arrangements on

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the issue of any shares for a difference between the holders of such shares in the amount of calls to be paid and the time of payment of such calls."

"82. The business of the company shall be managed by the board, who may pay all expenses of or incident to the formation, registration, and advertising of the company, and the issue of its capital, including brokerage and commissions for obtaining applications for or placing shares."

On February 1, 1901, the directors sent a circular to the existing shareholders informing them that "the directors have determined to issue 80,000 shares of the unissued capital of the company to existing shareholders, in the proportion of one share for every five shares now held, at the price of 2*l.* 10*s.* per share, payable 10*s.* on allotment, 1*l.* on April 30 next, and 1*l.* on June 30 next." This circular contained the following paragraph: "The issue to the extent of 60,000 shares has been guaranteed in consideration of an option to June 30 next on 15,000 shares at the issue price."

Before the date of this circular the directors on behalf of the company had entered into an agreement with some underwriters to underwrite or guarantee the subscription for 60,000 of the 80,000 shares. The terms of this agreement were embodied in a letter in the following form, which was signed by the underwriters respectively:—

"Underwriting letter.

"Matabele Gold Reefs, Limited.

"Issue of 80,000 shares of 1*l.* each.

"To the Matabele Gold Reefs, Limited.

"1. For the consideration hereinafter mentioned I hereby undertake to subscribe, or find responsible subscribers to the company's satisfaction, for shares of 1*l.* each, at the issue price of 2*l.* 10*s.* each, and to pay the amounts due on application and the subsequent calls as made.

"2. All subscriptions by the shareholders accepted by the company are to be applied pro ratâ in reduction of the amount so guaranteed by me and all the underwriters.

"3. In consideration of my undertaking as above mentioned, I or my nominees are to have the right, at any time or times

up to June 30 next, to subscribe for and to have allotted to me or them, at the issue price of 2*l.* 10*s.* per share, shares of the company's capital, being a portion of the unissued shares remaining after the above issue of 80,000 has been made.

"4. This letter is irrevocable provided that 60,000 shares are underwritten on the terms of this letter.

"5. I undertake not to sell any shares of the company, either of those referred to above or any now standing in my name, within one month of the date of the above issue.

"6. In the event of my failing to subscribe or provide responsible subscribers to the company's satisfaction for the shares underwritten as above provided, I hereby authorize Mr. G. R. Saunders on my behalf and in my name to apply for the same or my proportion thereof as above mentioned, which application and agency I undertake not to withdraw."

The option extended to 15,000 shares altogether.

Mr. G. R. Saunders was the secretary of the company.

Neither the articles of association nor the circular to the shareholders contained any statement of the amount or the rate per cent. of commission authorized or proposed to be paid to the underwriters.

On February 6, 1901, the plaintiff, a shareholder in the company, suing on behalf of himself and all other the shareholders, issued the writ in this action, by which he claimed an injunction to restrain the company from carrying into effect the underwriting agreement, or, in the alternative, an injunction to restrain the company from applying, or agreeing to apply, any of its shares or capital money directly or indirectly in the payment of a commission or allowance to any person in consideration of his subscribing or agreeing to subscribe for all or any part of the issue of 80,000 shares of 1*l.* each of the company then being offered to its shareholders in accordance with the terms of the circular of February 1, 1901.

On February 14, 1901, the directors sent the following circular to the shareholders:—

"Your directors are glad to be able to state that the circular of the 1st inst. announcing the new issue of shares has met

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with the general approval of the shareholders, and that, in consequence of the improvement in the market price of the shares (contrary to the expectation of prominent dealers who were consulted before the terms of the issue were settled), and the fact that some dissatisfaction has arisen in respect of the terms originally arranged with the guarantors, these gentlemen, all of whom are largely interested in the company, have agreed to raise the price of the option to 3*l.* 15*s.* per share."

At this time the market price of the shares was more than 3*l.* 15*s.* per share.

*Upjohn, K.C.*, and *Eustace Smith*, for the plaintiff.

*Bramwell Davis, K.C.*, and *A. R. Kirby*, for the company. (1)

Feb. 26. FARWELL J., after stating the facts and referring to s. 8, continued:—Sub-s. 1 of s. 8 is a conditionally enabling clause, and it is admitted that, if the present case falls within it, the necessary conditions have not been complied with. Sub-s. 2 is a general prohibitive clause, extending to every application of shares or capital, except in the case excepted by sub-s. 1. It was argued for the defendants that sub-s. 2 applied only to the case of an offer of shares to the public, and that the

(1) By s. 8 of the Companies Act, 1900, "(1.) Upon any offer of shares to the public for subscription, it shall be lawful for a company to pay a commission to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, if the payment of the commission and the amount or rate per cent. of the commission paid or agreed to be paid are respectively authorized by the articles of association and disclosed in the prospectus, and the commission paid or agreed to be paid does not exceed the amount or rate so authorized. (2.) Save as aforesaid no company shall apply any of its shares or capital money either directly or indirectly in payment of any commission, discount, or allowance, to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, whether the shares or money be so applied by being added to the purchase-money of any property acquired by the company or to the contract price of any work to be executed for the company, or the money be paid out of the nominal purchase-money or contract price, or otherwise. (3.) But nothing in this section shall affect the power of any company to pay such brokerage as it has heretofore been lawful for a company to pay."

Act was intended to protect that portion of the public only who had not yet become members of a company, leaving actual members unprotected, and it was said that this is not an offer to the public (a point with which I will deal presently), and therefore is not within the Act at all. I am unable to accede to this contention. The Act applies (s. 31) to every company, whether formed before or after the commencement of the Act, and I can find no ground for limiting the general words of prohibition in the limited nature of the exception from that general prohibition; nor can I see any reason why existing shareholders should not be protected as well as prospective shareholders. It was suggested rather than argued that sub-s. 1 applies, and that the circular of February 1 was an offer to the public. In my opinion, this is not so. I think that the clue to the meaning of the word "public" as used in this Act is to be found in s. 10, sub-s. 4: "This section shall not apply to a circular or notice inviting existing members or debenture-holders of a company to subscribe for further shares or debentures, but, subject as aforesaid, this section shall apply to any prospectus whether issued on or with reference to the formation of a company or subsequently"; and "prospectus" is defined by s. 30 as meaning "Any prospectus, notice, circular, advertisement, or other invitation, offering to the public for subscription or purchase any shares or debentures of a company." An offer is not the less made to the public because it is sent to shareholders or debenture-holders as well as to other persons, or because it is not advertised in the public newspapers. But if it is sent solely to the shareholders or debenture-holders of the company, there is no offer to the public. The distinction is between persons who are members or debenture-holders of the company, on the one hand, and those who are not, on the other. I therefore hold that this circular is not an offer of shares to the public under sub-s. 1.

But the plaintiff rested his main contention on sub-s. 2, and argued that an allotment of shares under the underwriting agreement would be an application, direct or indirect, of shares in payment of commission, discount, or allowance to persons in consideration of underwriting. I am of opinion that this

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contention is sound. Suppose that the directors were indebted to A. B. in 1000*l.*, and they allotted to him 400 1*l.* shares at par, when their market price was 2*l.* 10*s.*, in discharge of the debt; they would, in my opinion, clearly have applied those shares to the payment of that debt. They could in no other way justify their action in issuing shares at par instead of obtaining a proper premium. How, then, can the directors in the present case justify the issue of shares to a favoured individual at less than the market price, except on the ground of a valuable consideration issuing from that individual to the company? And what other consideration is there than the underwriting agreement? It was said by the defendants that the company might have agreed to pay a sum equal to the difference between 2*l.* 10*s.* and the market price on June 30, but that is not the present transaction. Here the underwriters will get the shares, and may retain them or deal with them as they please. The shares will, in fact, be applied in paying them, and the difference between the market price and the 2*l.* 10*s.* will merely afford the reason inducing the underwriters to exercise or refrain from exercising their option to have the shares applied in payment of the consideration for their underwriting agreement. It is said that the section was intended to prevent a vendor from giving part of his shares to underwriters. But, assuming this to be so, I can see no reason why the words of the Act should not be applied to other transactions which are fairly within the expressed intention of the Act and the mischief intended to be thereby prevented. It was urged that the premiums could not be capital, and that the consideration for the underwriting might be paid out of premiums. But that is not the case before me. The Act distinguishes between capital and shares, and forbids the application of either in payment of underwriting commission, and I have to consider only a dealing with shares, and not with the money produced by those shares. I therefore grant an injunction in the terms of the 2nd subsection of s. 8 of the Act, limiting it to shares.

H. L. F.

C. A. The company appealed. The appeal came on for hearing on March 20, 1901.

*Swinfen Eady, K.C.*, *Bramwell Davis, K.C.*, and *A. R. Kirby*, for the company. No part of the capital of the company is to be employed in paying the commission to the underwriters. The full amount of each of the option shares is to be paid by the underwriters to the company, and a further premium of 1*l.* 10*s.* (since increased to 2*l.* 15*s.*) per option share is to be paid. This is not a device for paying underwriting commission out of capital, nor is it a device for loading the price to be paid for property acquired by the company. No property is sold by the underwriters to the company. The company is a going concern, and the premiums on the shares are not part of the shares, and might be treated as profit divisible among the shareholders: *Lubbock* v. *British Bank of South America* (1); *Verner* v. *General and Commercial Investment Trust.* (2) The underwriters have only an option to take the shares at a specified price. If the market price of the shares should fall below that price, the option would of course not be exercised; and in that case the company would pay no commission. If the market price should exceed the option price, the difference would represent the profit made by the underwriters, and it would amount to the same thing as if the company had agreed to pay them that difference out of the profits of the company.

The object of s. 8 was to extend, not to restrict, the power of a company to pay commission upon the issue of capital. Sect. 8 does not apply to the present case. Sub-s. 1 does not apply, for this is not an offer of shares to the public. Nor does sub-s. 3 apply. Sub-s. 2 does not apply, for there is no application of shares or capital of the company in the payment of the commission. The commission is to be paid by means of a premium beyond the option price of the shares, and that premium is not part of the share, nor is it part of the capital of the company. Before the Act of 1900 it was held by this Court that a reasonable amount of commission or brokerage might be paid for placing shares: *Metropolitan Coal Consumers' Association* v. *Scrimgeour* (3); *Shaw* v. *Holland.* (4)

(1) [1892] 2 Ch. 198.
(2) [1894] 2 Ch. 239.
(3) [1895] 2 Q. B. 604.
(4) [1900] 2 Ch. 305.

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*Upjohn, K.C.*, and *Eustace Smith*, for the plaintiff. This underwriting agreement is clearly an agreement for the "application" of shares in payment of the commission. The 15,000 shares are to be allotted to the underwriters. The fact that there is also a consideration to be paid by the underwriters to the company for the shares does not alter this; the shares are to be allotted, and that is an "application" of the shares. A specified number of shares is to be applied in payment of the commission. Suppose the company had agreed to pay a lump sum for commission, and had then agreed to issue shares in payment of that sum, that would clearly have been an application of the shares in payment of the commission, and the present transaction is in substance the same thing. The law before the Act was settled by *Metropolitan Coal Consumers' Association* v. *Scrimgeour*. (1) The payment of an ordinary commission to brokers or other agents for placing shares was permissible, but nothing more was allowed. That which was not permitted was forbidden. A company might then employ agents to do work in connection with the placing of shares, and might pay them a fair and reasonable remuneration or commission for the work done by them. But this power did not extend to the payment of commission to underwriters who did no work, but only incurred a liability by subscribing for shares: *In re Faure Electric Accumulator Co.* (2)

What alteration, then, has s. 8 of the Act of 1900 made in the law? Sub-s. 1 is, as Farwell J. called it, a "conditionally enabling" clause, but it does not apply to the present case, because the conditions have not been fulfilled. Sub-sect. 3 preserves the law laid down in *Metropolitan Coal Consumers' Association* v. *Scrimgeour* (1) as to the payment of ordinary brokerage. Sub-s. 2 is declaratory of the law, subject to the alteration made by sub-s. 1. The present transaction is clearly an "application" of shares in paying underwriting commission. It is said on behalf of the appellants that the shares are not "applied," because their full nominal value is to be paid by the underwriters. It is submitted that any dealing with shares for a particular purpose is an "application" of them for that

(1) [1895] 2 Q. B. 604. (2) (1888) 40 Ch. D. 141.

purpose, notwithstanding that the par value is paid for them. Moreover, sub-s. 2 says "shares or capital money," and the money paid for the shares is "capital money." It has been suggested that the underwriting agreement is in substance only a promise that, if before June 30 a profit arises from the sale of the shares, the company will pay that profit to the underwriters. But that is not really the substance of it, for the underwriters are to have the shares, and may then retain them. And, in fact, the underwriters expressly undertake not to sell any shares of the company within a month of the date of the issue. And, even if the agreement is in substance that which is suggested, it amounts to a promise to deal with the shares in a particular way. Sub-s. 2 forbids the application of shares "directly or indirectly" in payment of commission, and this is at any rate an "indirect" application of shares in that way.

It is said that premiums on the issue of shares are profits, and may be applied in the payment of commission to underwriters. In *Lubbock* v. *British Bank of South America* (1) it was only decided that a profit or premium on capital might be carried to profit and loss account; it does not follow that premiums on shares will be profits, for there might be losses on the other side exceeding them. On the whole, it is submitted that this underwriting agreement clearly involves an application of shares in payment of underwriting commission, and is prohibited by sub-s. 2.

*Bramwell Davis, K.C.*, in reply. In the cases before the Act of 1900 the question was, whether that which was being done amounted to an issue of shares at a discount. The decision in *In re Faure Electric Accumulator Co.* (2) must be taken to have been overruled by *Metropolitan Coal Consumers' Association* v. *Scrimgeour.* (3) A company may lawfully give an option to take shares if the articles of association confer a power to do so: *In re South African Trust and Finance Co.* (4); *Hirsch* v. *Burns.* (5) In the present case clause 4 of the articles authorizes the directors to give such an option.

(1) [1892] 2 Ch. 198.
(2) 40 Ch. D. 141.
(3) [1895] 2 Q. B. 604.
(4) (1896) 74 L. T. 769.
(5) (1897) 77 L. T. 377.

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It is submitted that sub-s. 2 does not cover this underwriting agreement. There is no application of the face value of the shares. There is no dealing with the shares qua shares as part of the capital of the company. There is no agreement to issue shares by way of commission. If the company agreed to allot the shares to the underwriters for nothing by way of commission sub-s. 2 would apply, but it does not apply when the company are to receive the nominal value of the shares and also a premium, even though the underwriters may also obtain a profit. And, if the shares fell in value below the 2*l.* 10*s.*, after the underwriters had applied for them, still they would be obliged to take them.

RIGBY L.J. It appears that this company has been down to the present time prosperous, so that no doubt as things now stand the shares are worth a good deal more than the nominal amount of 1*l.* per share.

The plan proposed by the company was out of the unissued capital of about 113,000*l.* to issue 80,000*l.* These 80,000 shares were to be offered in the first place to the existing shareholders, but the company was not minded to enter upon a transaction of this magnitude without having some security against the possible event of the existing shareholders not taking up all the 80,000 shares, and accordingly the directors entered into what is called an "underwriting agreement," i.e., they procured certain persons, who may or may not have been shareholders in the company, to enter into an agreement to this effect—that they would take up to the extent of 60,000 shares the shares which the existing shareholders did not take at the price at which they were offered to the existing shareholders, and that they should have in addition the option of taking at the same price 15,000 more of the unissued shares. If it should turn out that the company's shares kept increasing in value, so that the price of 2*l.* 10*s.* per share which was to be paid would be less than the market value, this would be a most valuable option for the underwriters. On the other hand, this would be a great limitation of the rights of the company, and in proportion as the option was valuable to the underwriters it would

be onerous to the company. Under the underwriting agreement the company, if called upon in accordance with the conditions imposed, were bound to allot to the underwriters 15,000 shares in the whole, and the question now raised is, whether on the true construction of s. 8 of the Companies Act, 1900, this arrangement is under the circumstances permissible.

We are relieved from considering many minor points by the frank admission of counsel that the company cannot claim the benefit of sub-s. 1 of s. 8. Whether this was or was not an "offer of shares to the public for subscription," the company could not claim the benefit of sub-s. 1 unless they could point to some clause in their articles of association which authorized them to pay commission and stated the amount or rate per cent. which might be paid. This is required by sub-s. 1, and the company could not pay a larger commission than that which is prescribed by the articles. There is no such clause in these articles, and that alone would prevent the company from claiming the advantage of sub-s. 1. It has also been admitted, as must necessarily have been admitted, that sub-s. 3 has no application here. The only question, therefore, left for us to consider is the effect and meaning of the prohibitive sub-s. 2.

It has been said that the construction of that sub-section is very difficult. I cannot see the difficulty. It appears to me as plain as it could well be made. "Save as aforesaid," that is, subject to sub-s. 1, which it is admitted has no effect in this case, "no company shall apply any of its shares or capital money." "Apply any of its shares." How can there be any doubt as to the meaning of those words? "Apply" means simply what it says, and nothing else. "Shares" means shares, and nothing else. We have not to consider the case of capital money here, because we have to deal only with an application of shares. "No company shall apply any of its shares .... either directly or indirectly in payment of any commission, discount, or allowance, to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares of the company." Those are the important words. No doubt the company by this underwriting agreement did agree to allot

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shares to the underwriters in consideration of their applying conditionally or unconditionally for other shares in the company. They agreed to allot the 15,000 shares in consideration of subscriptions for the other 60,000 shares.

A great deal of ingenuity has been spent in attempting to shew that this is a difficult sub-section. No doubt it is difficult if it is wrested from its plain meaning. But I think that difficulty is avoided by giving the plain primâ facie meaning to the words. It is said the Legislature must have meant "shall apply the shares up to the nominal value." I can see nothing about the nominal value of the shares. Companies very often find to their loss that their shares are not valued according to their nominal amount, and that which has been issued in pounds as the nominal amount may only be worth pence. It does not so frequently happen that a share which has been issued at 1*l.* becomes worth a great deal more, it may be several pounds; but still the share is worth to the company what it will bring. That is its value. If it will bring more than 1*l.*, its nominal amount, that is its value to the company, and if they apply a share which nominally only amounts to 1*l.*, but is really worth more, say several pounds, they apply several pounds' worth of their property, and they are prohibited by sub-s. 2 from doing it, in the payment of commission to underwriters for subscribing for other shares in the company. That, as it appears to me, is the plain straightforward meaning of the sub-section. By this agreement the company enable the underwriters to say, "In consideration of our paying you 2*l.* 10*s.* per share you are to give us 15,000 shares which, before we exercise our option, we have satisfied ourselves will be worth more than the 2*l.* 10*s.*" In other words, "You will enable us to make out of this transaction of subscribing for shares a profit or commission." A commission need not be expressed either in a percentage or in a definite amount; if it be plain that a profit may be realized, I think that it amounts to payment of a "commission, discount, or allowance." It amounts to money's worth which it is contemplated that the subscribers for shares will obtain, and the mode in which it is to be obtained is by "applying" the other shares. How can you apply shares

more clearly than by allotting them? When you allot the shares you apply, not their nominal value, but the shares, and that is what sub-s. 2 prohibits.

It is not necessary to enter any further into the details of the case, it being conceded that sub-s. 2 is the only one which has to be interpreted, and its interpretation being, in obedience to its plain language and meaning, that which I have stated, I will add no more in support of my view, which agrees with that which was taken by the learned judge in the Court below. In my opinion the appeal should be dismissed.

VAUGHAN WILLIAMS L.J. I agree. If the underwriters in the exercise of their option ask for these 15,000 shares, and an allotment is made to them by the company, that allotment will be made in consideration of the underwriters subscribing or agreeing to subscribe for other shares of the company, and I do not think it is the less so because the allotment may be made at a premium. Such an allotment is, in my judgment, plainly and manifestly an "application" of the shares within the meaning of the word "apply" in sub-s. 2.

It was not really argued that, if you take the literal meaning of the words, this is not an "application" of the shares within the meaning of sub-s. 2. It was said that you ought not to read "apply" in its natural sense, but that you ought to read it as if the words had been, "save as aforesaid, no company shall apply the proceeds of the issue of its shares, so far as the same are capital or any other capital moneys," &c. I cannot see any reason for modifying the meaning of the word "apply." The reason that has been suggested for so doing is that this section of the Act is really directed against the misapplication of capital. I do not know that that is so. On the contrary, when I find that a distinction is drawn between "shares" and "capital money," I am led rather to the contrary conclusion. It is quite possible, I think, that the very object of the Legislature in so wording this sub-section was to prevent the payment of these commissions for placing shares by giving options of this description. But, whether that be so or not, I have only to decide this case upon that which appears

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to me to be the perfectly plain meaning of the words of the sub-section.

STIRLING L.J. I am of the same opinion. The matter really lies within a very narrow compass. It has been admitted that neither sub-s. 1 nor sub-s. 3 of s. 8 applies to this case. [His Lordship read sub-s. 2, and continued:—]

That being so, let me ask this question. Could a company, having 1*l.* shares, issue or allot one of those shares partly in consideration of 2*l.* 10*s.* paid for it, and partly in consideration of an agreement by the allottee to subscribe for other shares in the company? I think not. That would be an application of the share partly in consideration of an agreement to subscribe for other shares of the company, which, as it appears to me, is struck at by this section of the Act. It is quite true that the whole consideration would not be the agreement to subscribe for other shares, but none the less, I think, would it be within the section. And if there were any doubt about it, it would, as it seems to me, be removed by the subsequent words, which specify instances which fall within the prohibited modes of applying for shares, one being when the shares are so applied by being added to the purchase-money of any property acquired by the company. If I am right in that conclusion, then I think it follows that the agreement in the present case is beyond the powers of the company, and is prohibited by sub-s. 2. There is first an agreement on the part of the underwriter to subscribe for certain shares in the company, and then the document proceeds: "In consideration of my undertaking as above mentioned"—namely, the agreement to subscribe—"I am to have the right at any time or times up to June 30 to subscribe for and to have allotted to me at the issue price of 2*l.* 10*s.* . . . . shares of the company's capital." That, I think, is an agreement on the part of the company to do the very thing which I have suggested.

In my opinion the judgment of Farwell J. was perfectly correct, and ought to be affirmed.

Solicitors: *Ashurst, Morris, Crisp & Co.; Morse Hewitt & Farman.*

W. L. C.

## MANCHESTER SHIP CANAL COMPANY *v.* MANCHESTER RACECOURSE COMPANY.

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[1899 M. 3423.]

*March* 1, 4, 5; *April* 1.

*Contract — Illegality — Remoteness — Uncertainty — Statutory Confirmation — Pre-emption, Right of — Contract to give "First Refusal" of Land — Negative Contract — Interest in Land — Purchaser with Notice — Injunction.*

An agreement scheduled to an Act of Parliament was thereby "confirmed and declared to be valid and binding upon the parties thereto":—

*Held*, that every clause of the agreement had statutory validity, so that no objection could be taken on the ground of remoteness or uncertainty.

An agreement between a racecourse company and a canal company contained a clause that if the racecourse should be at any time proposed to be used for dock purposes, the racecourse company should give the canal company the "first refusal" thereof:—

*Held*, that "first refusal" imported either a fair and reasonable offer to sell to the canal company, or that the price at which the racecourse company were to give the canal company the "first refusal" was a price which the racecourse company would accept from other would-be buyers in the event of the refusal of the canal company to buy at that price: i.e., that the canal company had a "right of pre-emption"; and that an offer to the canal company at an extravagant price which the racecourse company did not reasonably expect would be given either by the canal company or any other would-be buyer was not giving a "first refusal" within the meaning of the clause:

*Held*, also, that the clause did not create an interest in land so as to entitle the canal company on that ground to enforce their right of pre-emption as against an intending purchaser with notice of the right; but that the canal company were entitled to enforce their right as against the racecourse company and the intending purchaser, on the ground that the contract to give the canal company the "first refusal" involved a negative contract not to part with the racecourse to any one else without giving them that "first refusal": *Lumley* v. *Wagner*, (1852) 1 D. M. & G. 604.

Appeal from Farwell J., [1900] 2 Ch. 352, dismissed with costs.

THIS case came before the Court of Appeal on separate appeals by the defendants, the Trafford Park Estates, Limited, and the Manchester Racecourse Company, Limited, from the decision of Farwell J. (1)

The plaintiffs, the Manchester Ship Canal Company, were incorporated under the Manchester Ship Canal Act, 1885

(1) [1900] 2 Ch. 352.

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(48 & 49 Vict. c. clxxxviii.), for the construction of a canal and docks, and the defendants, the Manchester Racecourse Company, Limited, were a company whose racecourse adjoined the canal which had been constructed by the plaintiffs under their Act. Certain disputes having arisen between the canal company and the racecourse company with reference to a variety of matters, on March 7, 1893, an agreement under seal was entered into between the two companies in order to settle those disputes.

This agreement was scheduled to the Manchester Ship Canal (Surplus Lands) Act, 1893 (56 & 57 Vict. c. lxxiii.), whereby, after reciting that the companies had entered into the agreement, and that it was expedient that the agreement should be confirmed, which object could not be obtained without the authority of Parliament, the agreement was, by s. 10, "confirmed and declared to be valid and binding upon the parties thereto."

The agreement was, so far as is material, as follows:—

"An agreement made March 7, 1893, between the Manchester Racecourse Company, Limited (hereinafter called 'the racecourse company,' which expression shall include their successors and assigns where the context so requires or admits), of the one part, and the Manchester Ship Canal Company (hereinafter called 'the canal company,' which expression shall include their successors and assigns where the context so requires or admits) of the other part. In order to settle and determine certain disputes and differences subsisting between the racecourse company and the canal company, it is hereby agreed as follows:—"

"(3.) If and whenever the lands and hereditaments belonging to the racecourse company, and now used as a racecourse, shall cease to be used as a racecourse, or should the aforesaid lands and hereditaments be at any time proposed to be used for dock purposes, then and in either of such cases the racecourse company shall give to the canal company the first refusal of the aforesaid lands and hereditaments en bloc . . . ."

By clause 5 it was agreed that, subject to the provisions of clause 6, the canal company admitted that the racecourse company were, in respect of the lands then used by them as

a racecourse, owners of land abutting upon the canal, and as such owners entitled to the privileges defined in s. 62 of the Manchester Ship Canal Act, 1885, so far as was requisite, whenever it was determined to make docks upon the said lands, to give to the racecourse company water access as thereinafter mentioned into such docks from the ship canal for any ships navigating the canal to such docks, and free of wharfage rates: and that the canal company would, whether such water access was made or not, give to the racecourse company access by rail and road by suitable connections with the canal company's railways and roads adjoining the said lands: such means of access to be effected at the cost of the racecourse company.

Clause 6 provided that the racecourse company should not be entitled to any such access unless and until they entered into a deed of covenant with the canal company to the effect that, in case the said lands belonging to the racecourse company were not purchased by the canal company, the racecourse company would not carry or permit to be carried any goods or merchandise from the said lands to any place or places whatsoever at a less rate than should from time to time be charged by the canal company for the conveyance of similar goods or merchandise from their Manchester or Salford docks to the same place or places.

In July, 1899, the canal company were proposing to sell a part of their property with the object of purchasing with the proceeds the racecourse of the racecourse company for dock purposes; and on August 10, 1899, they informed the racecourse company that they, the canal company, proposed to take compulsory powers for the purchase of the racecourse, but were willing to negotiate with a view to coming to an agreement if the racecourse company were disposed to sell. Negotiations then commenced between the two companies, and during their progress the racecourse company, about September 18, 1899, consulted their solicitor as to their obligation to the canal company under clause 3 of the agreement of March 7, 1893, when he advised them, and the board minutes recorded, that "it was thought no harm could come from our naming a figure, say, 350,000*l*."

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The negotiations continued until towards the end of September, 1899, without the intervention of any other company or person as a proposed purchaser, but on or about September 29 the Trafford Park Company began to negotiate with the racecourse company for the purchase of the racecourse. The Trafford Park Company, who proposed to use the land of the racecourse, or some part of it, for dock purposes, on October 4, 1899, made a verbal offer to purchase at the price of 250,000*l.*, with the benefit of certain stipulations in favour of the racecourse company; and thereupon, at an interview that took place on October 11, 1899, between Mr. Davies, the chairman of the racecourse company, and Mr. Wallis, the land agent of the canal company, Davies offered the property to the canal company for 350,000*l.*, but without mentioning the Trafford Park Company's offer of 250,000*l.*; and in the course of a discussion on clause 3 of the agreement of March 7, 1893, Davies stated that the racecourse company had been advised that they would be complying with the clause if they offered the property to the canal company for 1,000,000*l.*, and that, failing acceptance, they could sell it next day to any other person for 100,000*l.*; a view with which Wallis expressed his disagreement. No offer whatever had been made to the racecourse company by any company or person to purchase the property at 350,000*l.*, and it was clear that that figure was far beyond any that the racecourse company had any reasonable expectation of ever being offered.

On October 20, 1899, Davies, on behalf of the racecourse company, wrote to the canal company a letter in which he said that the conditions which he understood Wallis to accept as the basis of negotiations were—(1.) that the racecourse company should have a reasonable time within which to prepare for the continuance of their racing business on the site belonging to them at Castle Irwell, and (2.) that the sale should be subject to the necessary licence being obtained for that purpose from the Jockey Club. The letter then proceeded to state that, subject to those two conditions, the racecourse company were prepared to sell the property to the canal company for the sum of 350,000*l.*; and the canal company were requested to

state within a week whether or not the offer was accepted, and, if not accepted, to state the highest sum they were prepared to give for the property, subject to the above conditions. On October 27, 1899, the chairman of the canal company wrote to Davies neither accepting the offer nor making any counter-offer, but expressing a desire that the negotiations should continue. On October 30, 1899, Davies wrote to the chairman of the canal company that as they had not accepted the offer of the racecourse company or made any counter-proposal, that company felt at liberty to deal with their property as they might think fit. In November an interview took place between Wallis and Davies, at which the former offered 200,000*l.* for the property. Davies pressed Wallis to offer 250,000*l.*; but the latter said he could go no further unless Davies was in a position to settle; to which Davies replied that he could only carry the offer to his co-directors.

The racecourse company eventually refused the offer of 200,000*l.*, and, without making any further offer of the land to the canal company, immediately offered it to the Trafford Park Company at 300,000*l.*, instead of the 350,000*l.* at which they had offered it to the canal company, and ultimately, by the agreement of December 22, 1899, agreed to sell it to the Trafford Park Company for 280,000*l.*, with the benefit of certain stipulations in favour of the racecourse company, including an option of taking certain land of the Trafford Park Company for a racecourse, the value of which Farwell J., as already stated in the former report, found to be nothing like 70,000*l.*, the difference between the 350,000*l.* and the 280,000*l.*

The agreement was expressed to be subject to the right of "first refusal" given to the canal company by clause 3 of the agreement of March 7, 1893, and the Trafford Park Company undertook to indemnify the racecourse company against all claims by the canal company under that clause.

The canal company were not at the time informed of the price agreed to by the Trafford Park Company, but upon the proposed sale to that company coming to their knowledge, they considered it was in breach of clause 3 of the agreement of March 7, 1893, and therefore brought this action against the

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racecourse company and the Trafford Park Company, claiming a declaration that the defendants were not entitled to enter into any contract for the sale and purchase of the racecourse land without first complying with clause 3; and also an injunction restraining the defendants from completing or carrying out any agreement for the sale and purchase of the land in violation of clause 3, and in particular from carrying out the agreement of December 22, 1899.

At the trial of the action (1) Farwell J. held, upon the construction of clause 3 and on the facts, that the right of the canal company to have the "first refusal" of the property had arisen: that a "refusal" implied an offer, not at any price, however extravagant, the racecourse company chose to ask, but at a price which some other person was willing to give, and which the canal company could, if they chose, accept, and which it was within their statutory powers to accept. And the learned judge granted an injunction restraining the racecourse company from selling the racecourse to any person or company without having first offered it to the canal company at the same cash price that the intending purchaser, the Trafford Park Company, was offering; and also an injunction restraining the defendants from completing or carrying out the agreement of December 22, 1899, unless and until that had been done.

The defendants, as already stated, appealed separately.

The appeals were heard on March 1, 4, and 5, 1901.

*Upjohn*, *K.C.*, and *Stewart-Smith*, for the defendants, the Trafford Park Company. It is submitted that the decision of Farwell J. was wrong on several grounds.

(1.) Clause 3 of the agreement of March 7, 1893, is conditional; it operates only on the happening of one of two events. The first event—the land ceasing to be used as a racecourse—has not happened. The second alternative—should the land be "proposed to be used for dock purposes"—means, so proposed by the owner for the time being of the land, i.e., the racecourse company, their successors and assigns, not by the canal company.

(1) [1900] 2 Ch. 352.

(2.) There is no evidence that the canal company did propose to use the land for dock purposes before the agreement of December 22, 1899. They had only stated their intention to apply to Parliament for power to take the land. If the time for giving the "first refusal" had not arrived, a sale of the land subject to the rights of the canal company could not be open to objection.

(3.) The meaning of "first refusal" is that the canal company were to have a bonâ fide opportunity of negotiating for the purchase of the land, the canal company being afraid that a rival undertaking might be set up on the land. The construction which Farwell J. has given to the words would prevent the racecourse company from selling their land by auction, or, indeed, from selling it to any one but the canal company. No one would negotiate for the purchase of the land if his offer must, before acceptance, be communicated to the canal company in order to see whether they would buy the land at the price which he had offered.

(4.) Having regard to what took place in October and November, 1899, the canal company have in fact had the "first refusal" of the land. They were invited to offer 250,000*l.*, and they declined to give more than 200,000*l.*

A sale of the land subject to the rights of the canal company cannot be a breach of the agreement with them.

Again, the canal company have no right of action against the Trafford Park Company. The agreement of March 7, 1893, does not give the canal company any interest in the land. No price is named in it, and no means of ascertaining the price is pointed out. But if the agreement does confer an interest in the land, it is invalid on the ground that it tends to a perpetuity: *London and South Western Ry. Co.* v. *Gomm.* (1) This was admitted by the learned judge, but he held that the agreement was validated by s. 10 of the Manchester Ship Canal (Surplus Lands) Act, 1893 (56 & 57 Vict. c. lxxiii.). That section, however, only makes the agreement "valid and binding upon the parties thereto." It does not make it binding upon the land. The objection of perpetuity does not arise as between

(1) (1882) 20 Ch. D. 562.

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the parties; it is an objection as regards the land itself. Again, the Court has no general jurisdiction to restrain a breach of contract: *Heathcote* v. *North Staffordshire Ry. Co.* (1) Specific performance of the agreement could not be enforced: *De Mattos* v. *Gibson* (2); *Fothergill* v. *Rowland.* (3) The Court will not interfere to prevent a breach of the agreement, whatever legal remedy the plaintiffs may have against the racecourse company.

*Warmington, K.C., Hughes, K.C.*, and *A. L. Ellis*, for the defendants, the racecourse company. Subject to the equitable rights which are given to the plaintiffs by the agreement of March 7, 1893, the original power of the racecourse company to deal with their own land is unaffected by the agreement. On the happening of either of the specified events, the plaintiffs are to have the "first refusal" of the land en bloc. The learned judge held that this means a first refusal of an offer to sell for cash the whole property. The question is one, not of price, but of user. The racecourse company have entered into an agreement with the Trafford Park Company expressly reserving the rights of the canal company under the agreement with them. That agreement contemplates something more than a payment in cash. The racecourse company have to procure another piece of land more convenient for their purposes. As between the racecourse company and the Trafford Park Company the agreement for sale to the latter was a perfectly proper one. What more could the racecourse company do than give notice (as they did) to the Trafford Park Company that they were owners of the land subject to a restriction, and bargain to sell the land to the Trafford Park Company subject to the equity of the canal company? The racecourse company have acted with perfect bona fides. The plaintiffs' equity is in no way affected by the agreement with the Trafford Park Company. The case is similar to that of a lease granted with an option to the lessee to purchase the reversion in fee. The lessor could still sell the reversion, and the option could be exercised by the lessee against the purchaser. The judgment

(1) (1850) 2 Mac. & G. 100, 112. (2) (1859) 4 De G. & J. 276.
(3) (1873) L. R. 17 Eq. 132, 140.

of the learned judge prevents the racecourse company from selling their land for anything but cash.

[VAUGHAN WILLIAMS L.J. Does not "first refusal" in this agreement mean much the same thing as the right of pre-emption of superfluous land of a railway company given to the neighbouring landowner by s. 128 of the Lands Clauses Consolidation Act, 1845 ?]

If the canal company do not require the land it would be to them superfluous land, and ss. 127 and 128 of the Lands Clauses Consolidation Act would apply.

*Moulton, K.C., Cripps, K.C., Swinfen Eady, K.C.*, and *O. L. Clare*, for the plaintiffs, the canal company. Whatever may be the right construction of clause 3 of the agreement of March 7, 1893, the canal company have not had the "first refusal" of the land. But their subsequent acquisition by their Act of compulsory powers has put matters in the same position as under s. 127 of the Land Clauses Consolidation Act.

The agreement of March 7, 1893, was entered into to put an end to certain litigation between the parties, and by it the racecourse company obtained great advantages, for which they paid a consideration. It may be that they cannot now sell their land by auction, but they obtained a quid pro quo for this restriction. The agreement does not purport to make any diminution in the price which they may be able to obtain for their land, but only alters the power to sell at once to any proposed purchaser. Clause 3 was intended to restrict greatly the power of alienation. The racecourse company are prevented from selling the land in parcels; they must offer it all en bloc to the canal company. The object was to enable the canal company to obtain the land in case docks should be wanted; no one was to use the land for docks, unless it was first offered to the canal company. Clause 3 must be interpreted by reference to clauses 5 and 6 and to s. 62 of the canal company's Act of 1885. "Proposed to be used for dock purposes" means proposed either by the canal company or by any other person. "Frontagers" had no right to construct docks, but only a right to construct conveniences for loading and unloading goods. Sect. 62 of the canal company's Act of 1885 (48 & 49 Vict.

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c. clxxxviii.) empowers the owner or occupier of any land abutting on the canal to construct and maintain on his land private wharves or landing-places, side basins and lay-bys, but nothing is said about "docks."

Again, the words "proposed to be used for dock purposes" in clause 3 of the agreement mean, so proposed by any company which alone has statutory authority to use the land for dock purposes—that is, the canal company.

The point that the event on which the canal company are to have the "first refusal" has not yet arisen is sufficiently answered by Farwell J. in his judgment. (1)

[VAUGHAN WILLIAMS L.J. In *Jones* v. *South Staffordshire Ry. Co.* (2) it was held that the arbitration sections in the Lands Clauses Consolidation Act, 1845, did not apply to an arbitration to ascertain the price of surplus land under s. 130.]

Sect. 130 applies to superfluous lands only, and any dispute as to the price to be paid on pre-emption of superfluous lands must be referred to arbitration under that section alone.

The Court has power to grant an injunction to restrain dealing with the legal estate: *London and County Banking Co.* v. *Lewis.* (3)

*Upjohn, K.C.*, in reply.

*Cur. adv. vult.*

April 1. The judgment of the Court (Rigby, Vaughan Williams, and Stirling L.JJ.) was delivered by

VAUGHAN WILLIAMS L.J., who, after stating the facts, continued:—The main question in this action is whether or not, according to the true construction of the scheduled agreement, the defendants did give a "first refusal" of the racecourse land to the canal company. There appear to be two possible meanings of the words "first refusal": one is that they mean the opportunity of refusing a "fair and reasonable offer" by the racecourse company to sell the lands en bloc to the canal company; the other is that they mean the opportunity of refusing the land at a price acceptable to the racecourse com-

(1) [1900] 2 Ch. 363. (2) (1869) 19 L. T. 603.
(3) (1882) 21 Ch. D. 490.

pany offered by some person other than the canal company, which is what we understand by the term "right of pre-emption."

Now, the obligation to give a first refusal arises in either of two events, namely, (1.) if and whenever the lands shall cease to be used as a racecourse; and (2.) should the lands be proposed to be used for dock purposes. Clause 5 of the agreement appears to me to shew that it was in the contemplation of the parties that the lands might be used for dock purposes while remaining in the hands of the racecourse company, and consequently without that company having determined to sell or part with the ownership of the lands. The object of clause 3, read in connection with clauses 5 and 6, appears to be to protect the canal company as dock owners against competition, and the risk intended to be guarded against is the same whether the racecourse company or some third party is owner of the docks. The agreement does not provide that the first refusal shall be given at any particular price or on any particular terms; nor that the price and other terms shall be ascertained by arbitration, or in any other way. Looking at these circumstances, we think there is at least fair ground for the contention that the clause only imports that the racecourse company shall, in either of the prescribed events, make a fair and reasonable offer to sell the lands to the canal company; and we wish to consider the case from this point of view, which is the view most favourable to the defendants.

[His Lordship then referred to the negotiations that took place between the racecourse company and the canal company commencing on August 10, the subsequent negotiations between the former company and the Trafford Park Company, the offer by the racecource company in the letter of October 20, 1899, to sell to the canal company for 350,000*l.*, and its refusal, and the ultimate contract for sale to the Trafford Park Company for 280,000*l.* His Lordship then proceeded:—]

We think that the price of 350,000*l.* was one which the racecourse company did not really expect to get, and that the offer made by the letter of October 20, 1899, was not a fair and reasonable one. We also think it was not the duty of the canal

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company to make a counter-proposal. That company was entitled to a "refusal," which, we agree with Farwell J. in thinking, imports an offer on the part of the racecourse company. In our judgment the evidence shews that at the very moment when the racecourse company were offering the land to the canal company at 350,000*l.* the racecourse company had determined to sell to the Trafford Park Company for a less sum, and that in this sense the offer made by the letter of October, 1899, was not a fair and reasonable one. The contrast of figures is not so violent as in the supposed case where the racecourse company, for the purpose of freeing themselves entirely from the obligations of clause 3, offer at 1,000,000*l.*, and, having got their freedom by the continued refusal of that offer, subsequently sell at 100,000*l.*; but taking the consecution of events here, and the range of prices discussed at the previous negotiation between Davies for the racecourse company and Wallis for the canal company, we have no more doubt than we should have had in the supposed case but that 350,000*l.* was an offer made at a figure which was above the price which the racecourse company were willing to take from the Trafford Park Company, and we do not think such an offer is an offer within the meaning of clause 3, whatever construction is put upon it.

We think that the very words "first refusal" in clause 3 import that the price at which the racecourse company give the canal company the "first refusal" is a price at which the racecourse company will offer the land to other would-be buyers in the event of the refusal of the canal company to buy at that price. If there is no person negotiating a purchase it may not be easy to prove that the price offered to the canal company is above the price which the racecourse company are willing to take from persons other than the canal company; but whenever this can be proved, it seems to me that there is a clear infraction of the right of pre-emption given to the canal company by clause 3. In the present case, however, there is no difficulty of proof.

Having thus disposed in the negative of the question whether the racecourse company did give the canal company a "first refusal" within the meaning of clause 3, we will now deal

with the question whether either of the alternative conditions accrued giving rise to the right of refusal. The lands do not seem to have ceased to be used as a racecourse, and therefore one must consider the second alternative condition—namely, whether the lands were proposed to be used for dock purposes. We do not agree with Farwell J. that the words "should the aforesaid lands and hereditaments be at any time proposed to be used for dock purposes" include a proposal so to use the lands by the canal company. We think that the proposal must be by the racecourse company, their successors or assigns—in other words, by a possible competitor in the dock business. But this is not very important, except as bearing on the construction of the clause, because we agree with Farwell J. that, within the meaning of this clause, the Trafford Park Company proposed before and at the time of the contract of sale entered into between themselves and the racecourse company to use the land for dock purposes. The Trafford Park Company, who were negotiating the purchase of the land, proposed to use it, and the racecourse company proposed to sell it, for that purpose. This being so, the canal company became entitled to a "first refusal"; and, whatever those words may mean, the canal company, in our opinion, have not had a "first refusal"; for if one takes, as we have done in this judgment, the construction of clause 3 most favourable to the defendants, the racecourse company on the happening of either of the alternative conditions came under the obligation to make a fair and reasonable offer to sell the lands to the canal company, and this, in our opinion, for reasons which we have already given, the racecourse company have never done. If, on the other hand, clause 3 means that the right of "first refusal" is not to arise until some person or company other than the canal company makes an offer acceptable to the racecourse company and that the racecourse company will then come under an obligation to offer the land at the same price to the canal company, it seems clear that the racecourse company have not done so. In either case the fact that the racecourse company offered and sold the lands to the Trafford Park Company at a less price than that at which they offered the lands to the



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canal company seems conclusive. The offer to the canal company was not fair and reasonable, because the racecourse company were willing, at the very time of the offer, to take a less price from the Trafford Park Company, and alternatively the canal company never had the refusal of the offer made by the racecourse company to the Trafford Park Company. We have already said that we agree with Farwell J. that the value of the option to the racecourse company to take land of the Trafford Park Company for a racecourse is not sufficient to account for the 70,000*l.*, the difference between the cash price at which the racecourse company offered the land to the canal company and the cash price at which they actually sold to the Trafford Park Company. We agree with Farwell J. that there is no evidence that the option was anything like the value alleged. We do not decide that the racecourse company could only negotiate with the Trafford Park Company for an exclusively cash price; but we do decide that, even if the racecourse company could negotiate for a mixed price, yet the cash price at which they offer the land to the canal company for acceptance or refusal must not exceed the total of the cash price at which they have offered the land to the third person plus the reasonable cash value of the option which they take as part of the purchase price.

It only remains now to deal with a few objections urged to Farwell J.'s judgment. First, it was urged before us that the agreement in clause 3 was void for remoteness or uncertainty. We think, for the reasons given by Farwell J., that every clause of the agreement has statutory validity, and that no objection can be taken on that score. Then it was objected that clause 3 could not be enforced against the Trafford Park Company, who are only alienees of the land. Farwell J., thought that clause 3 created an interest in land, and that this objection could be thus answered. We do not think that clause 3 does create an interest in land, nor do we think that there is anything in the decisions in *Tulk* v. *Moxhay* (1) or in *London and County Banking Co.* v. *Lewis* (2) which gets over the objection.

It seems, however, from the decision in *Willmott* v. *Barber* (3)

(1) (1848) 2 Ph. 774. (2) 21 Ch. D. 490. (3) (1880) 15 Ch. D. 96.

that the Trafford Park Company could not obtain a decree for specific performance of a contract for sale and purchase of land, if that sale would be a breach of a prior contract with a third person; and it seems to us to follow that one ought to treat this case on the basis of an action to restrain a breach of a contract threatened to be carried out in pursuance of a subsequent contract by the defendant with a third person having full knowledge of the first contract. This seems to bring the case within the principle of *Lumley* v. *Wagner*. (1) The contract here to give the canal company the "first refusal" involves a negative contract not to part with the land to any other company or person without giving that first refusal. If the action had been brought against the racecourse company, the party to the contract, alone, the injunction asked for could not have been granted without affecting the rights and interests of the Trafford Park Company. They are necessary parties to the action, just as Mr. Gye was a necessary party to the action of *Lumley* v. *Wagner* (1), for to grant the injunction in that case was to prevent Miss Wagner from carrying out her contract to sing at Mr. Gye's opera-house; and, if the defendant, thus brought in, comes and insists on his right to have the second contract carried out, we do not see why the injunction should not be granted against him.

*Heathcote* v. *North Staffordshire Ry. Co.* (2) was cited to us to shew that no injunction could be granted against the third person in such a case; but so it was cited in *Lumley* v. *Wagner* (1) with the same object, yet Lord St. Leonards, nevertheless, granted the injunction against Mr. Gye.

There are only two more objections to mention: one is that it is said that, if the agreement for the sale of the racecourse to the Trafford Park Company is carried out, the plaintiffs will not be hurt, because the contract of sale is expressly subject to their rights. But the answer to this is, on the question of the amount of compensation to be paid on compulsory purchase, it may make a great difference to the canal company, who are the claimants.

Then it is said that the plaintiffs could not insist on the

(1) 1 D. M. & G. 604. (2) 2 Mac. & G. 100.

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"first refusal," because they could not buy without taking fresh statutory powers. It seems to me that the answer to this is that all the parties to the contract were perfectly well aware of this at the time when the contract was made.

For the reasons we have given we think the judgment of Farwell J. ought to be affirmed; and the appeal must, therefore, be dismissed with costs.

Solicitors: *Ashwell, Browning & Tutin, for Ashwell & Tutin, Nottingham; Lovell Widdrington Byrne, for Taylor, Kirkman & Colley, Manchester; Grundy, Kershaw, Samson & Co., London and Manchester.*

G. I. F. C.

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C. A. 1901 *April* 16.

## *In re* BELHAM. RICHARDES *v.* YATES.

[1899 B. 384.]

*Administrator—Creditor—Retainer—Administration Decree—Administration Bond, Form of—"Not unduly Preferring."*

Under the modern form of a creditor's administration bond—by which the creditor administrator undertakes to pay the debts of the deceased "in a due course of administration rateably and proportionably, and according to the priority required by law, and not unduly preferring his own debt or the debts of any other of the creditors of the deceased by reason of his being an administrator as aforesaid"—he may still retain, out of moneys coming to his hands or in court in an administration action by other creditors, his own debt as against other debts of equal degree.

*Davies* v. *Parry*, [1899] 1 Ch. 602, approved.

On the death intestate, on October 26, 1898, of James Dolby Belham, a builder, letters of administration were granted to a creditor, Joseph Yates, upon his entering into an administration bond in the sum of 5100*l.* and conditioned to be void if he made a true inventory of the estate of the deceased devolving upon him as personal representative of the deceased and coming to his hands or into the hands of any other person for him, "and the said estate and all other the estate and effects of the said deceased at the time of his death which at any time after shall

come to the hands or possession of the said Joseph Yates, or into the hands or possession of any other person or persons for him, do well and truly administer according to law (that is to say) do pay all and singular the debts which he did owe at his decease, in a due course of administration rateably and proportionably, and according to the priority required by law, and not unduly preferring his own debt or the debts of any other of the creditors of the said deceased by reason of his being an administrator as aforesaid."

On January 25, 1899, this creditors' action was commenced, by originating summons against Yates the administrator, for the administration of the personal estate of the intestate, and on February 22, 1899, the usual administration judgment was pronounced.

By his certificate, dated January 17, 1901, the master found that the debts of the intestate amounted altogether to 335*0l.*; that his personal estate was insufficient for the payment of his debts in full; and that the defendant Yates claimed "by virtue of his right of retainer, as the legal personal representative of the intestate, to be paid the debts hereby certified to be due to him, amounting together to 957*l.* 7*s.* 5*d.*, in priority to all the other creditors of the intestate."

The assets of the intestate consisted of a sum of 514*l.* 6*s.* 8*d.* in the administrator's hands, and also sums of 6*l.* 14*s.* 9*d.* cash in court, and 452*l.* 7*s.* 10*d.* on deposit in court, both paid in by the administrator, making a total of 973*l.* 9*s.* 3*d.*, that is, only 16*l.* 1*s.* 10*d.* in excess of his claim. As this claim, if allowed, would practically sweep away the whole of the available assets, the plaintiff served the defendant with a notice of motion, dated February 6, 1901, in the Probate Division, that the administration bond "may be varied by striking out the word 'unduly' in the body of the said bond, or otherwise altered so as to carry out the true intention of this Honourable Court, namely, that the respondent should administer the estate of the deceased by paying all and singular the debts which the deceased owed, rateably, without preferring or giving advantage to the respondent as administrator; or otherwise, in the alternative, to revoke the administration

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already granted to the respondent, and to re-issue it to the applicant, or some other creditor willing to give such bond."

The motion was heard before Gorell Barnes J., when the recent decision of Romer J. in *Davies* v. *Parry* (1) was relied upon by counsel for the administrator. At the conclusion of the arguments Gorell Barnes J. reserved judgment, which he delivered on March 8, 1901, refusing the motion. His Lordship, who delivered an elaborate judgment, said he felt himself bound by Romer J.'s decision to refuse the motion, though he did not agree with that learned judge's construction of the bond.

On March 28, 1901, the action came on for further consideration in Court before Joyce J., when the questions of the construction of the bond and of the administrator's right of retainer was fully argued by counsel for the plaintiff, and the judgments of Romer J. and Gorell Barnes J. were brought to the attention of the Court. Joyce J., without calling upon counsel for the defendant, the administrator, said he agreed with Romer J. in holding that "not unduly preferring" did not mean "not preferring at all"; and that all the administrator was thereby debarred from doing was "unduly preferring"; that is, that he could not retain as against a debt of a higher degree than his own. His Lordship accordingly made an order declaring that the defendant, the administrator, was entitled to retain his debt out of the money in his hands and the sums in court; and as the balance of 16*l.* 1*s.* 10*d.* was insufficient to pay the defendant's costs of action, his Lordship directed that the entire fund in court should be paid out to the defendant.

The plaintiff appealed.

The appeal was heard on April 16, 1901.

*Griffith Jones* and *Morgan Griffith Jones*, for the plaintiff. The present form of administration bond has been adopted in consequence of the decision in *In the Goods of Brackenbury* (2), the intention being, as pointed out by Hannen J., that a creditor taking out administration shall be debarred from preferring his own debt. That intention is given effect to by the view taken by Gorell Barnes J. of the administration bond, and

(1) [1899] 1 Ch. 602. (2) (1877) 2 P. D. 272.

which view is, I submit, the correct one, whereas the decision of Romer J. in *Davies* v. *Parry* (1) takes too narrow a view and defeats the very object and intention of the bond. None of the cases cited either in the argument or the judgment in *Davies* v. *Parry* (1) really dealt with a creditor's pro ratâ bond. The whole object of the bond is clear, namely, to ensure an equal distribution among the creditors without favouring one more than another.

[They also referred to *Stahlschmidt* v. *Lett* (2) as to the circumstances in which an administrator may lose his right of retainer.]

*Ingpen, K.C.*, and *Whinney*, for the defendant, the administrator. The right of a creditor administrator to retain his debt remains, unless prior to and as a condition of the grant of administration he agrees to waive the right. What is the right of retainer possessed by an executor or administrator who is also a creditor? It is a right to retain against the debts of other simple contract creditors: not against a debt of a higher degree than his own. "Not unduly preferring" only means that the administrator is not unduly to prefer by paying his own debt and the debts of other creditors before debts of a higher degree: he is not to take advantage of his position by misappropriating the moneys coming to his hands in applying them otherwise than according to law. That is the sole object and meaning of the bond.

The result of acceding to the plaintiff's contention would be to strike out the word "unduly," thus altering the contract under which the defendant took out administration, and depriving him of the advantage his superior diligence in taking out administration has obtained for him. The real question is whether he has contracted not to avail himself of his ordinary legal right of retainer. We submit that the words of the bond are not sufficient for that purpose. He is to administer "according to law (that is to say)": and then follow words shewing that the existing law on the subject, including his right to prefer his own debt to others of equal degree, is not to be altered. If his right of retainer is taken away, he would

(1) [1899] 1 Ch. 602. (2) (1853) 1 Sm. & Giff. 415.

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not be administering "according to law," but according to some other system supposed to have been laid down by contract between the parties. Gorell Barnes J. has misapprehended the reasoning of Romer J., who has held that, reading the whole clause together, the intention is that the administrator may prefer, so long as he does not do so "unduly," the only preference the law allows being as against a debt of equal degree, not as against one of a higher degree, such as a specialty creditor: *Wilson* v. *Coxwell.* (1)

*Griffith Jones,* in reply.

RIGBY L.J. I am of opinion that the decision arrived at by the learned judge below is right and ought to be affirmed. No doubt, one can see that there are reasons for wishing, perhaps, that the law were simpler, and that the mere fact that a man has obtained the right to administer an estate should not always give him the right, if money be owing to him from the deceased, to retain part of the assets in respect of his debt; but that is not the law as laid down by the cases. If the assets are sufficient for the payment of all the debts of the deceased in full, including the debt of the administrator, of course no question of preference arises; but there are numerous cases, such as the present, where, if the administrator applied the money coming to his hands in payment of his own debt, no other debts would be paid at all. Such a preferential payment may be in accordance with the rule in the administration of assets, but it is by no means a desirable one: however, that is the general rule adopted in such cases. I agree with Joyce J., who decided that, in the absence of any other rule, the right of the administrator in the present case must prevail, and that he is entitled to retain his own debt, that being in a due course of administration.

COLLINS L.J. I am of the same opinion. I think the point is, in substance, decided by *Nunn* v. *Barlow* (2), as Romer J. pointed out, and by a number of other cases. In that case it was decided that, notwithstanding an administration decree,

(1) (1883) 23 Ch. D. 764. (2) (1824) 1 S. & S. 588; 24 R. R. 242.

the administrator kept his right of retainer. That case, as it seems to me when analyzed, decides the whole point in the present case. The administration bond does this: it writes out at large that which is contained in an ordinary administration decree—that is to say, the obligation to administer rateably and proportionably and according to priority. If that be so, and if these words are in the ordinary administration decree, the case to which I have referred, *Nunn* v. *Barlow* (1), distinctly decides that is not incompatible with the legal right of the administrator to retain his debt. If that is conceded, it disposes of the whole point upon which Gorell Barnes J. relied in differing from the view of Romer J., for Gorell Barnes J. said that, in his view, Romer J. had not sufficiently considered the effect of the words "rateably and proportionably." That being so, these words being, as they are, inherent in the ordinary administration decree, add nothing by being written out at large in the bond given by the administrator. So we have arrived at this—that, unless the bond can be construed as a waiver of the right the administrator would otherwise have, he retains that right. It seems to me that by merely writing out at large, as I have said, what is already to be found in an administration decree, the administrator has not lost any of his rights.

In my judgment, the decision of Romer J. is amply justified by the previous decisions, and the opinion of Gorell Barnes J. cannot be sustained. This appeal must, therefore, be dismissed.

STIRLING L.J. I am of the same opinion. Romer J., in deciding the case of *Davies* v. *Parry* (2), refers to the terms of the bond which imposes upon the administrator the duty of paying the debts "rateably and proportionably, and according to the priority required by law, and not unduly preferring his own debt." Now, upon that he remarks that the administrator is not prohibited absolutely from preferring his own debt. All that he is prohibited from doing is "unduly preferring his own debt." What does that mean? Clearly it means that he may not pay his own debt in priority to any debt which, according

(1) 1 S. & S. 588; 24 R. R. 242. (2) [1899] 1 Ch. 602.

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to law, ought to be paid before it. That would be, obviously, an undue preference.

But then it is said that it would be undue preference if he paid his own debt before those of equal degree with his own. That Romer J. did not see: neither do I. The right of retainer which it is sought to enforce here is given to the legal personal representative by reason of this—that he, being at once creditor and legal personal representative, is unable to sue himself: he is, therefore, entitled to use the assets that come to his hands to meet his debt. I cannot say that is undue preference within the meaning of the bond. I think, therefore, that the decision of the learned judge in the Court below is right.

*Griffith Jones.* Will your Lordships allow the costs of this appeal to come out of the assets?

RIGBY L.J. Certainly not. You have chosen to take the risk. The appeal is dismissed with costs.

Solicitors: *Woosnam & Smith, for Smith, Davies & Co., Aberystwith; H. B. Worrell & Son.*

G. I. F. C.

## BEVAN *v.* WEBB.

C. A.
1901
*April* 24;
*June* 5.

[1901 B. 60.]

*Partnership—Books and Accounts—Right of Partner to Inspect—Inspection by Agent—Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 24, *sub-s.* 9.

Partnership articles provided that proper books of account should be kept by the managing partners for the time being, and that each of the partners should have free access to, and liberty to examine and copy, or take extracts from any of the books and writings of the partnership at all reasonable times:—

*Held*, that under this provision, as well as under s. 24, sub-s. 9, of the Partnership Act, 1890, any partner was entitled to have the books and accounts examined on his behalf by an agent appointed by him for the purpose, provided that the agent was a person to whom no reasonable objection could be taken by the other partners, the agent also undertaking not to make use of the information which he should thus acquire except for the purpose of confidentially advising his principal.

Decision of Joyce J., [1901] 1 Ch. 724, reversed.

APPEAL against the decision of Joyce J. (1) refusing a motion by the plaintiffs for an injunction to restrain the defendants from preventing or interfering with the examination or investigation by F. C. Bridges, a brewery and hotel auctioneer and valuer, or such other accountant or valuer as might be duly appointed for that purpose by the plaintiffs, of the books of account, bills, and other writings kept by the defendants as the managing partners of a brewery business in which the plaintiffs were also partners.

The business was carried on at Aberbeeg in Monmouthshire.

The partnership was constituted by articles of partnership dated July 4, 1893.

The partners were John Richard Webb and John Edgar Webb, his son, who were the defendants; Agnes Emily Webb, widow, and Henry Le Brasseur, who were the executors of Tom Alexander Webb, deceased; the Rev. William Bevan, of West Hamilton, Canada, clerk in holy orders; Henry Crook Bevan, of Nantyglo, Monmouthshire, surgeon; Thomas Webb Bevan, of the same place, surgeon; Harriet Agnes Bevan, of the same

(1) [1901] 1 Ch. 724.

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place, spinster; and the Rev. Daniel Griffiths, of Llangronog, Cardiganshire, clerk in holy orders, and Mary Ann Dorothy, his wife.

The articles contained (inter alia) the following clauses:—

(7.) "The said John Richard Webb and John Edgar Webb, or such of them as shall from time to time be living and able and willing to act, shall be the managing partners of the firm, with full powers on behalf of all the partners to manage and carry on the partnership business."

(16.) "Proper books of account shall be kept by the managing partners for the time being in which all transactions relating to the partnership business shall be duly entered, and such books, together with all bills, letters, and other writings which shall from time to time concern the said partnership business, shall be kept at the counting-house of the partnership, and each of the partners shall have free access to and liberty to examine and copy or take extracts from any of the books and writings of the partnership at all reasonable times."

The action was brought by the Rev. William Bevan, Henry Crook Bevan, Thomas Webb Bevan, and Harriet Agnes Robinson (the wife of James Robinson), formerly Harriet Agnes Bevan, spinster, against the managing partners.

Negotiations had taken place between the plaintiffs and the defendants with reference to a proposed sale of the plaintiffs' shares in the business to the defendants. The plaintiffs desired that the partnership books should be examined and investigated on their behalf by a professional valuer for the purpose of ascertaining the value of their shares, and they nominated for the purpose Mr. F. C. Bridges, a brewery and hotel auctioneer and valuer. The defendants raised no personal objection to him, but they asserted that the right of inspection given to the partners by clause 16 was a merely personal right, and that it could not be exercised by means of an agent. The defendants were, however, willing that the partnership books should be examined on behalf of the plaintiffs by the auditors of the firm, and that the results obtained from the auditors should be submitted by the plaintiffs to a valuer selected by them.

In the course of a correspondence which took place, the

plaintiffs' solicitor, on November 1, 1900, wrote as follows to the defendants' solicitors: "My clients claim to nominate whoever they think proper to make the investigation on their behalf, provided of course that the person appointed is of standing and not in himself objectionable. They claim to have a full and complete examination of the books of the partnership, and they also claim to be entitled to inspection of the properties and other assets of the partnership."

In reply to this the defendants' solicitors on the same day wrote as follows: "We do not think the articles entitle any partner to send a valuer (although he may be a person of standing and not in himself objectionable) to make an examination of the books, or to inspect the properties and other assets of the partnership, and until you satisfy us that such power is given, we on behalf of the managing partners decline to allow it."

Ultimately, on January 5, 1901, the plaintiffs issued the writ in this action, by which they claimed—

(1.) A declaration that they were entitled, by or through an independent accountant or valuer to be appointed by them for the purpose, to examine and to copy or take extracts from all the books of account, bills, and other writings kept by the defendants as the managing partners of the business.

(2.) An injunction to restrain the defendants from preventing or interfering with the examination or investigation of the books of account, bills, and other writings by such accountant or valuer as might be duly appointed by the plaintiffs for that purpose.

The plaintiffs moved for an injunction as above stated.

Joyce J. refused the application.

The plaintiffs appealed.

*Younger, K.C.*, and *Lyttelton Chubb*, for the plaintiffs. It is submitted that, as any partner has the right under clause 16 of the articles to have access to and to examine and copy the books of the partnership, he is entitled to do this, not only personally, but also by means of an agent, provided that the agent is a person who is not objected to, or who cannot reasonably

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be objected to, by the other partners, and provided that this right of inspection is not unfairly or oppressively exercised. The defendants have not raised any personal objection to Mr. Bridge; their objection applies to any agent, and they say that the right is only a personal right of the partner. The plaintiffs are persons who have no practical knowledge of the business, and are not acquainted with book-keeping, and the right of inspection which is given to them will be nugatory, if they may not employ an expert to make the inspection on their behalf. On principle it would seem that the plaintiffs are entitled to employ an agent to do on their behalf that which they are entitled to do themselves. Clause 16 of the articles is in substance equivalent to s. 24, sub-s. 9 (1), of the Partnership Act, 1890 (53 & 54 Vict. c. 39); so that the question is one of general importance. Joyce J. relied on the absence of authority on the point. But there is no authority adverse to the plaintiffs' claim, except an obiter dictum of Lord Colonsay in a Scottish case, *Cameron* v. *M'Murray* (2), where the learned judge said, "it is not the privilege of a partner to introduce a stranger to examine the books." This dictum was not adopted by the other judges, and in fact in that case inspection by an agent was allowed. In *Brown* v. *Perkins* (3) the representatives of a deceased partner were allowed to inspect the partnership books by means of an agent. The inspection in that case was, no doubt, as Joyce J. said, incidental to a litigation between the partners; but the reasoning of Wigram V.-C. goes further than the particular case. And litigation does not give a partner any greater right of access to the partnership books. *Dadswell* v. *Jacobs* (4) was a case of principal and agent, but the observations of the judges apply to a case of partnership. Lindley L.J. said (5): "No doubt the principal is entitled to come and see the books if he likes, and he is entitled to have a copy of them sent by the agent at the prin-

(1) Sect. 24, sub-s. 9: "The partnership books are to be kept at the place of business of the partnership (or the principal place, if there is more than one), and every partner may, when he thinks fit, have access to and inspect and copy any of them."

(2) (1855) 17 D. 1142, 1143.

(3) (1843) 2 Hare, 540.

(4) (1887) 34 Ch. D. 278.

(5) 34 Ch. D. 286.

cipal's expense. There is no controversy about that, and I am not at all prepared to deny his right to have the books inspected by a person whom the Court thinks is a proper person in case of dispute on that point. But I deny altogether the principle which has been so stoutly contended for, that the principal has a right to say he can appoint whom he likes, whether he makes a reasonable appointment or not." In *Trego* v. *Hunt* (1) Lord Halsbury said (2), speaking of the defendant, that the partnership books "are as much his books as they are the books of each of the other partners"; and he added, "Each partner, as a partner, is entitled to every piece of information for any purpose which the partnership books may give him." And Lindley L.J. said (3): "He has a right to use the books for any purpose which is not illegitimate or illegal." And in the same case, in the House of Lords, *Trego* v. *Hunt* (4), Lord Davey said (5): "As well under the general law as under the express provision of the articles of partnership, the defendant was entitled during the partnership to have access to the books and to make copies thereof or extracts therefrom." These cases establish the absolute unrestricted right of a partner to all the information contained in the partnership books. Again, in cases under s. 43 of the Companies Act, 1862, inspection by an agent has been allowed. In *In re Credit Co.* (6) it was held that the solicitor of a shareholder was entitled to inspect on his behalf the company's register of mortgages, the right of inspection being in terms given by s. 43 of the Companies Act, 1862, to a creditor or member of the company. And in *Mutter* v. *Eastern and Midlands Ry. Co.* (7) it was held that the right to inspect the register of debenture stockholders given to stockholders and others by s. 28 of the Companies Clauses Act, 1863, includes a right to take copies. The principle of that decision applies. Inspection of the books by the partner himself would be useless.

*Hughes, K.C.*, and *G. Cave*, for the defendants. It is

(1) [1895] 1 Ch. 462.
(2) Ibid. 471.
(3) Ibid. 472.
(4) [1896] A. C. 7.
(5) Ibid 26.
(6) (1879) 11 Ch. D. 256.
(7) (1888) 38 Ch. D. 92.

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submitted that, in the absence of express agreement, a partner has no right to employ an agent to inspect the partnership books; the right of inspection is limited to the partner himself. Sect. 24, sub-s. 9, of the Partnership Act, 1890, is in substance identical with clause 16 of these articles, and it gives the partners the right to inspect the partnership books. As the Act contains a code of partnership law, if it had been intended that a partner should be entitled to employ an agent to inspect the books, one would have expected that the code would contain an express provision to that effect.

[STIRLING L.J. As a general rule, a man may do by an agent that which he may do himself.]

Partners would object strongly to their books being inspected by some one who might be a rival in trade. In the case of litigation between partners there is no doubt a greater right of inspection, in order that the litigants may be able to put their case before the Court, and under the rules the Court has power to enforce inspection of documents. The maxim "Expressio unius exclusio alterius" applies. Sect. 24, sub-s. 9, must mean that in the absence of agreement a partner has no right to depute an agent to inspect the books for him.

[STIRLING L.J. You could not say that the managing partner must keep the books in his own handwriting. Why, then, may not the other partners employ an agent, e.g., to make copies of the entries in the books?]

The plaintiffs' claim is to employ any person they think fit to inspect the books, provided he is not personally objectionable.

[COLLINS L.J. Of course, the right cannot be used to the detriment of the other partners.]

The relation of partners is founded on mutual confidence, and it involves the necessity of secrecy as regards the business, and this of itself excludes the right of inspecting the books by an agent. It might be of the utmost importance that the secrets of the business should not be disclosed to a stranger. In *Brown* v. *Perkins* (1) there was a litigation after the dissolution of the partnership by the death of a partner. In *Dadswell* v. *Jacobs* (2) the question arose between principal and agent,

(1) 2 Hare, 540. (2) 34 Ch. D. 278.

not between partners, and there it was held that the principal could not compel the agent to produce his books to any person whatever whom the principal might appoint.

[STIRLING L.J. A partner could copy the entries in the books himself, and then he could shew the copy to a stranger for the purpose of obtaining advice.]

Sect. 31 of the Partnership Act, 1890, provides that an assignment by a partner of his share in the partnership does not entitle the assignee to interfere in the management or administration of the business, or to inspect the partnership books.

If the plaintiffs are right, a partner assigning his share might appoint the assignee his agent, and he would thus indirectly obtain information about the partnership and would evade the provisions of s. 31.

The difference between the right of inspection in an action and where there is no litigation is illustrated by *Williams* v. *Prince of Wales Life, &c., Co.* (1) In an action, according to the practice either party can have production of documents from his opponent, and the production may be to his solicitor, because the Court has complete control over the solicitor. This was pointed out by Cotton L.J. in *Dadswell* v. *Jacobs*. (2)

[COLLINS L.J. Could not the Court in the present case require the agent to undertake not to disclose the contents of the books to any other person? And, if so, would not the Court have the same control as in an action?]

In *Dadswell* v. *Jacobs* (3) the Court were inclined to think that such an action as the present could not be maintained, i.e., an action, not for a specific purpose in aid of which inspection of the books might be ordered, but only to enforce inspection.

The cases under the Companies Acts bear no analogy to partnership cases. In *In re Credit Co.* (4) the inspection was of the company's register of mortgages, which is a document of a quasi public nature. In *In re West Devon Great Consols*

(1) (1857) 23 Beav. 338.
(2) 34 Ch. D. 282.
(3) 34 Ch. D. 278.
(4) 11 Ch. D. 256.

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*Mine* (1) Cotton L.J. said (2) that the right of inspection of the company's books under s. 22 of the Stannaries Act, 1855, was peculiar to the shareholder himself. At the time of the execution of the articles it was known that one of the partners was residing in Canada, and the proper inference is that, if it had been intended that he should be entitled to employ an agent to inspect the books, there would have been an express provision to that effect. The Court will have regard to the views of the other partners, who own three-fourths of the business. They are willing to give the plaintiffs any reasonable information to enable them to ascertain the value of their shares, but they are unwilling that the secrets of the trade should be disclosed to strangers.

*Younger, K.C.*, in reply.

[STIRLING L.J. Is Mr. Bridges willing to give an undertaking to the Court not to make use of the information he may acquire from the books for any purpose but that of advising the plaintiffs as to the value of their shares?]

He will no doubt do so; but, if he will not, the plaintiffs are ready to nominate another person.

In *In re West Devon Great Consols Mine* (1) the company resisted inspection entirely. The order for inspection was affirmed, but Cotton L.J., without any argument on the point, expressed an opinion that the right of inspection was only personal to the shareholder. The other judges said nothing about that. The defendants' construction of s. 24, sub-s. 9, of the Partnership Act, 1890, is too narrow; the practical effect of it would be to deprive an absent or infirm partner of the right of inspecting the books.

COLLINS L.J., after reading the notice of motion for an injunction, continued:—The plaintiffs are, as they have been described, sleeping partners in a brewery business, which is carried on by the defendants as the managing partners. The plaintiffs have a considerable interest in the business. One of them resides in Canada. Some of the other plaintiffs are ladies, and all of them are persons of no technical experience in such

(1) (1884) 27 Ch. D. 106. (2) 27 Ch. D. 110.

a business. The defendants are actually carrying on, and are in possession of, the business as managers of it. [His Lordship read clause 16 of the articles of partnership, and continued:—]

Negotiations had been going on between the sleeping partners on the one hand and the managing partners on the other with a view to the acquisition by the managing partners of the interest of the sleeping partners in the business, and an offer had been made by the managing partners of a minimum price of 32,000*l.*, any surplus above that to be ascertained by arbitration; and it was in view of that offer that the plaintiffs were desirous of obtaining the inspection which they sought. The defendants absolutely refused to give the inspection asked for, that is, inspection by a person named by the sleeping partners, unless and until those partners had bound themselves by contract to sell their interest to the managing partners. The question therefore arises, whether the sleeping partners have a right to claim inspection by some person (other than themselves) to whom the defendants can have no reasonable objection. The question in controversy between the partners is formulated by two letters of November 1, 1900. [His Lordship read the passages above quoted from those two letters, and continued:—]

Those two letters open the controversy and enable us to distinguish the point in issue. Joyce J. has held that clause 16 of the articles does not give the sleeping partners a right to inspect by any person other than themselves—that the right is a mere personal one, not carrying with it any right to appoint an agent for the purpose of inspection. Clause 16 is practically, though not identically, in the terms of sub-s. 9 of s. 24 of the Partnership Act, 1890. [His Lordship read sub-s. 9, and continued:—]

Joyce J. in his judgment deals with the matter as being entirely free from authority. He says there is no authority in favour of the plaintiffs' contention, and he also, I think, says that there is no authority against it. The Scottish case—*Cameron* v. *M'Murray* (1)—was cited, in which a dictum of Lord Colonsay was said to be adverse to the plaintiffs' contention; but, if that dictum is really adverse, Joyce J. does not seem to

(1) 17 D. 1142.

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have considered it. He certainly did not treat it as adverse, because he said the matter was res integra as regards authority, and was therefore to be dealt with as a question of principle.

Now, that being so, in endeavouring to construe clause 16 of the articles and s. 24, sub-s. 9, of the Act, which are, I think, practically on all-fours, I ask, what is the object with which this right, or permission, or privilege is given to each of the partners in a partnership? What is the common-sense meaning of it? Surely the object is to enable the partners to ascertain the position of the partnership business. The partnership business is their own business, the books are their own books, and each of them has a right in them. Of course, their rights are qualified and regulated by the corresponding rights of the other partners; but the books which they desire to inspect, and which they have a right to inspect, are their own books. For what purpose is this provision made? It must be that the partners may be able to inform themselves of the position of the partnership. It is said that, because there is no provision either in the articles or in the Act enabling the partners in express terms to inspect by the agency of some one else, the right so to inspect is excluded. But again I ask, what is there to found the presumption that there is such an exclusion, for there is certainly no express exclusion? It must, if at all, be implied, because the word "agent" has not been used. If I were dealing with a matter not relating to a partnership, I should say that primâ facie a permission accorded to a specified person to do an act is accorded to him or his agents. If the object is to enable him effectually to make use of the right secured to him, and if that effectual user involves his using some means to that end—for instance, if he is a near-sighted man, the use of spectacles, or if he cannot see at all and he must make use of another's eyes instead of his own, or if being empowered to take copies of documents he cannot write, having lost his hands, and must use the hands of some one else—I should say that primâ facie the permission to do a thing carries with it the right to use the instrument necessary to prevent that right so conferred from being rendered ineffective, unless there is anything in the nature of the right or in the

relations of the parties from which we are bound to infer that the right must be in some way limited. Can we find anything here to suggest a limitation in the fact that the books which are to be inspected are the books of a partnership? It seems to me that there is nothing whatever in the fact that a man is a partner which can narrow the primâ facie right to use to the full extent the privilege which is accorded to him. To hold otherwise would amount to saying that, while all the partners ought to be on an equal footing, and ought to have equal opportunities of informing themselves from time to time of the position of the partnership, yet if it should happen that some partner, either from mental infirmity or from want of experience in the particular business, or from physical incapacity, was unable to avail himself of the right personally, he must cease to be on equal terms with the other partners, and be debarred from using the only means by which he could put himself in a position of equality, and gain that information which it is absolutely essential that he should possess. I cannot believe that any Act of Parliament could have been intended to bring about such a result, and I certainly cannot think that any persons could have intended to curtail their rights as partners in such a way. It seems to me that, so far from the presumption being against the intention to confer such a right, the presumption is all the other way, and that the onus should be on those who deny it to point to words suggesting such an exclusion.

That, as it appears to me, is the position of the matter regarded from the mere common-sense point of view, a priori, and without reference to any of the authorities. There is, of course, a natural common-sense limitation of such a right of inspection. The inspection is to be of books and documents in which all the partners are interested, and the inspection cannot be made in such a way as to curtail the rights or prejudice the position of the other partners. They are all interested in the matter, and one partner cannot assert his right in derogation of the rights of the others. But the interests of the others can be amply safeguarded by placing a limitation upon the particular agency which the inspecting partner desires to

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employ. The agent employed must be a person to whom no reasonable objection can be taken, and the purpose for which he seeks to use the right of inspection must be one consistent with the main purposes and the well-being of the whole partnership. That rule is easy of application. In the letters which I have read, which formulate the issue between the partners, there is no suggestion of any personal objection to the gentleman named by the plaintiffs to make the inspection on their behalf, and the Court would, of course, be prepared to impose a fetter upon the user by him of the information which he may acquire in that way.

Having now said thus much as to the a priori position, dealing with the matter on principle, I will consider shortly how far there is authority on the point. It seems to me that, if the point has not been in express terms decided, the principle which lies at the root of it has been assumed in more than one case. So far from the point being free from authority, it seems to me that all the real authority is in favour of the view which I have indicated. I think the first case cited by Mr. Younger has a very direct bearing upon the point, that is *Brown* v. *Perkins*. (1) The facts are thus stated: "Brown and Perkins were solicitors in partnership at Merthyr Tydvil. Brown died, and his representatives filed a bill against the surviving partner for an account; and, an answer being put in, the plaintiffs moved for the production of the papers admitted in the answer of the defendant to be in his possession and material to the account. The defendant stated that many of the papers referred to, related to the business of the clients of himself and his late partner, and concerned matters in which they had been entrusted in their professional character in secrecy and confidence; and that the disclosure of such matters to the solicitor of the plaintiffs, who practised in the same town and neighbourhood, might be prejudicial to such clients; and would be a breach of duty towards them; and that in several of such matters the solicitor of the plaintiffs was employed adversely, in his professional capacity, for other persons." Wigram V.-C. said (2): "The partners themselves, if they had been both

(1) 2 Hare, 540. (2) 2 Hare, 541.

living, and the question of account had arisen between them, would both have been entitled to see the papers which are part of the materials for taking the account; and it must, I think, follow that either of the partners might have employed a competent agent for the purpose of examining the papers on his behalf. If this be not so, no solicitor can employ another person to assist in the settlement of his partnership accounts, without submitting to have such accounts taken in an insufficient manner. In this case, I should think it would be a reasonable course for the papers to be inspected by some disinterested person—such as a town solicitor, or one not practising in the neighbourhood of these parties: but such an arrangement, if made, must be by consent." The comment made on that case is, that there the inspection was in a litigation, that it was ancillary to the main purpose of the litigation and not itself the main purpose, and it is said that that distinction is sufficient to prevent the case from having any bearing upon the present discussion. I take exception to that on two grounds. First, I say that the decision is not limited to the rights of partners in litigation, because the Vice-Chancellor puts that as an a fortiori case. He considers what would have been the rights of the two partners if they had both been alive, and not, as I understand him, engaged in a contentious suit for an account, but as if without litigation the one were demanding from the other an account. He says that in that case the partner would have been entitled to examine the partnership books, and for that purpose to employ a competent agent. This amounts, as it seems to me, to an expression of the Vice-Chancellor's opinion as to the rights of a partner in the absence of litigation. But, even if the right is limited to litigation, I do not see that that limitation is very material in the present case. For what is the meaning of granting inspection in a litigation? The Court has to determine whether the case is one in which the party who asks for it should have inspection, and when once the Court has arrived at the conclusion that he ought to have inspection, it is in the same position as we are now, unless the partnership deed or the nature of its conditions negatives the right. In the present case the person who is asking for it has a right of

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inspection, and that is all which would be decided in a litigation. It having been decided that the partner has a right to inspection, how is that right to be effectually exercised? There is no less necessity for its being effectual when it is given by a private agreement than when it is given as the result of litigation. In either case the question is, how is the inspection to be effectual? When once you have construed the private agreement and desire to give effectual inspection, then you give it exactly on the same principle, and judge it by the same standard as in the case of litigation. If as the result of litigation the inspection can be effectual only by the introduction of a third person as agent, in the same way it can only be effectual when it is given under a private agreement. Therefore *Brown* v. *Perkins* (1) appears to me to be a decision in favour of the view which I am taking.

Again, *Dadswell* v. *Jacobs* (2), although it did not relate to a partnership, seems to me an a fortiori case. The head-note is this: "A firm of merchants residing abroad brought an action against their agent in this country, claiming production of the documents relating to their business to a person appointed by them for that purpose. The defendant put in a defence, stating that the person appointed by the plaintiffs was a clerk in a rival and unfriendly house of business, for which reason he objected to produce the documents to him, but that he was willing to produce them to any proper person. The plaintiffs moved, under Order XXV., r. 4, to strike out the defence. *Held* (affirming the decision of Chitty J.), that, although a principal had a general right to the production of documents in the hands of his agent to any person appointed by him, he cannot insist on their being produced to an improper person; and therefore the defence disclosed a reasonable answer to the claim." Cotton L.J. says (3): "The plaintiffs are abroad, and of course it was the duty of the defendant, as agent, to produce to the principals any accounts that were kept for them; and where the principal is abroad, in my opinion the agent is bound to produce to any properly appointed agent of the principal

(1) 2 Hare, 540. (2) 34 Ch. D. 278.
(3) 34 Ch. D. 281.

any books of account kept for the principal." It is said that the present case is between partners, and that that case was one of agency. But partnership is only one division of the law of agency. A partner is a principal, but he is also an agent, and so this is even an a fortiori case. If the right to inspection by an agent exists as between principal and agent, it seems to me a fortiori that it ought to exist where the relation is not only that of principal and agent, but each party is for certain purposes a principal. Therefore I think that case is an authority that, in the absence of any special agreement, there arises out of the relation of principal and agent the right to inspection of the agent's accounts, and that the inspection can be made, when the circumstances justify it, by means of an agent. In the present case one of the partners who are seeking inspection happens to be abroad, but that is only one particular circumstance which shews that that mode of inspection is the only effectual one. It does not exhaust all the cases in which inspection can only be effectual if made by an agent. Then Lindley L.J. said (1): "No doubt the principal is entitled to come and see the books if he likes, and he is entitled to have a copy of them sent by the agent at the principal's expense. There is no controversy about that, and I am not at all prepared to deny his right to have the books inspected by a person whom the Court thinks is a proper person in case of dispute on that point." So that although the principal had not an absolute and unqualified right to have the books inspected by any one he pleased, which was what he claimed, the Court held that he had the qualified right of inspection by some one else, provided that that agent was one to whom no reasonable objection could be taken. I should have said, before referring to the authorities, that the defendants' contention appears to me still more difficult to maintain in view of the fact that they are obliged to concede that the plaintiffs, who in their view are debarred from inspecting the books by means of a third person, have the right to sit from day to day in the office of the managing partners and to make full copies of all the books, and when they have done that to

(1) 34 Ch. D. 286.

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hand over the copies to the very person to whom the right of inspection is denied. In conceding that, the defendants admit that the plaintiffs may in that roundabout fashion do that which might cause them greater inconvenience than if it were done in the simple manner claimed. It can be done by taking copies, and then sending those copies to other persons to examine.

The principle upon which this right of inspection rests has been discussed in other cases, and it has been distinctly stated when the question has arisen whether the right to inspect implies the right to take copies. It has been held that that right is implied in the right to inspect—and why? Because the inspection would not be effectual in the sense in which it was intended to be, unless it carried with it as a corollary that incidental right. The principle is nowhere stated more clearly than in *Nelson* v. *Anglo-American Land Mortgage Agency Co.* (1), in which the head-note is: "The right of a creditor or member of a company to inspect the register of mortgages under s. 43 of the Companies Act, 1862, includes a right to take copies of the register." Stirling J. in that case referred to the judgment of Lindley L.J. in *Mutter* v. *Eastern and Midlands Ry. Co.* (2), where he said (3): "Parliament having conferred the right to inspect, the Court ought not so to construe the statute as to render the right conferred illusory, and if the Court were to hold that in such a case as the present the right to inspect existed but the right to take copies did not, the Court would in effect be rendering the statute of no avail." That, I think, is very material upon the present point. The right, although conferred by an Act of Parliament which was in terms limited merely to inspection, carried with it by implication the means of rendering the inspection effectual.

Why should not that principle be applied to the present case? I think these cases are direct authority that it can and ought to be applied, unless there is something in the nature of the partnership which negatives the right. Otherwise you must read into the enabling provisions of the articles some exclusion of

(1) [1897] 1 Ch. 130. (2) 38 Ch. D. 92.
(3) 38 Ch. D. 107.

a particular mode of making use of the right conferred. Again, in *In re Credit Co.* (1), Hall V.-C. held that the solicitor of a shareholder was entitled to inspect the register of mortgages under s. 43 of the Companies Act, although that right is in terms given by s. 43 of the Act only to a shareholder. The Vice-Chancellor said (2): "As regards the register of mortgages, I am of opinion that there has been a refusal by the company to allow a shareholder to inspect it, though it has been contended that there was no refusal to him but to his solicitor. I consider that the refusal was to produce to the applicant, and that there was no ground for that refusal." That is an affirmation of the same principle. It is said that these cases have no bearing on the present discussion, because they relate to shareholders and statutory enactments. For the reasons I have given, I think they are directly in point as regards what is to be implied from a permission to inspect. How much does that permission cover? The decisions are that it covers everything which is necessary to make it effectual. That is the principle, and those cases cannot be distinguished from the present case by saying that they are company cases and this is a partnership case. They cannot be effectually distinguished except by pointing out some real difference, and the only distinction suggested is that because this is a partnership case the right to inspect by an agent is excluded. In my opinion that is not a substantial distinction, and if so those cases are direct authority that the permission to a man to do an act, which he cannot do effectually without the help of an agent, carries with it the right to employ an agent.

I need not consider in detail the other authorities to which we have been referred. Mr. Cave very properly called our attention to *In re West Devon Great Consols Mine* (3), in which, the point not having been discussed during the argument or even alluded to by Baggallay L.J., who gave the leading judgment, Cotton L.J. did no doubt say (4) that "the right of inspection is peculiar to the shareholder and does not extend to his solicitors or agents." The decision turned on

(1) 11 Ch. D. 256.
(2) Ibid. 260.
(3) 27 Ch. D. 106.
(4) Ibid. 110.

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the terms of the special Act regulating the rights of shareholders in companies subject to the Stannaries Court, and does not appear to me to be in point now, and at any rate that dictum of Cotton L.J. cannot outweigh those decisions on fact and on principle to which I have already referred.

Then reliance was placed on a dictum of Lord Colonsay in the Scottish case, *Cameron* v. *M'Murray*. (1) But that dictum, when read in connection with its context, does not, I think, assist the defendants at all. The language may not be as exact and precise as one could wish, but it seems to me to amount merely to an affirmation of that limitation which it is conceded must exist of the right of a partner demanding inspection. It comes to no more than this—that a partner has not an unqualified right to inspect the partnership books by any agent he chooses to appoint, and it does not affect the obligation imposed upon the other partners of allowing the books to be inspected by a stranger to whose intervention they cannot reasonably object. The right of inspection by an agent is qualified by its limitation to an agent to whom the other partners cannot reasonably object, and I doubt whether the learned President meant more than that. The actual decision in that case was that inspection must be given by means of an agent.

I desire to make one other observation. It has been urged that a different standard is to be applied to inspection in litigation as compared with inspection without litigation. I have already to a great extent dealt with that point when I asked Mr. Cave, who argued the case extremely well, what is the principle lying at the root of the distinction between the cases. Mr. Cave said that the principle is that which was suggested by Cotton L.J. in *Dadswell* v. *Jacobs* (2)—namely, that outside litigation the Court would have no control over the person who inspects, whereas in a litigation the Court can exercise control over him. How does that apply to the present case? The Court has now seisin of the whole matter, and is in a position to impose terms on the person inspecting. Clearly it has that power, and this is admitted by the plaintiffs, and they are ready

(1) 17 D. 1142. (2) 34 Ch. D. 282.

to accept the limitations which it is sought to impose upon them. Therefore, even if this case were to be tried by the standard for which the respondents contend, we are in a position to impose the limitations which can be imposed only as the result of litigation. Unquestionably this case is one of very considerable importance, for we are dealing not only with the particular provisions contained in these articles, but also incidentally, and because clause 16 is practically to the same effect, with the construction of s. 24, sub-s. 9, of the Partnership Act. For the reasons I have stated, I am of opinion that the judgment of the learned judge cannot be supported, and that an injunction ought to be granted.

STIRLING L.J. I entirely agree in the conclusion at which my learned brother has arrived, and in the reasons which he has given. But, as the point is one of considerable importance, and we are differing from the judgment of the Court below, I wish to add a few words.

The contention on behalf of the defendants is, that the right of access to and inspection of and the right of copying partnership documents which are conferred by sub-s. 9 of s. 24 of the Partnership Act, 1890, and are also conferred by clause 16 of the partnership articles with which we have now to deal, can be exercised only by the partners personally, and not by them through an agent. Now the general rule of law is, that whatever a person who is sui juris can do personally, he can also do through his agent. That is the general rule, but there are no doubt some exceptions. The reason of the rule is well stated in a few words in Story on Agency, 9th ed. The learned author says, at p. 2: "In the expanded intercourse of modern society it is easy to perceive, that the exigencies of trade and commerce, the urgent pressure of professional, official, and other pursuits, the temporary existence of personal illness or infirmity, the necessity of transacting business at the same time in various and remote places, and the importance of securing accuracy, skill, ability, and speed in the accomplishment of the great concerns of human life, must require the aid and assistance and labours of many persons, in addition to the

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immediate superintendence of him, whose rights and interests are to be directly affected by the results. Hence the general maxim of our laws, subject only to a few exceptions above hinted at, is, that whatever a man sui juris may do of himself, he may do by another." That principle has been adopted by the English Courts in many cases, as a very good illustration of which I may refer to *In re Whitley Partners, Limited* (1), though the decision has no direct bearing upon the present case. The head-note of that case is: "C. verbally authorized O. to sign on his behalf the memorandum of association of a company. O. accordingly signed the name of C. to the memorandum without his own name appearing. The company being in course of winding-up C. was put on the list, and applied to have his name removed, on the ground that he had never signed the memorandum nor agreed to take shares. *Held*, that there being nothing in the Companies Act, 1862, to shew that the Legislature intended anything special as to the mode of signature of the memorandum, the ordinary rule applied that signature by an agent is sufficient." I agree that when the right which is to be exercised is conferred by some written instrument, as, for example, either by a statute incorporated in a partnership contract or by the articles of partnership, it may be that, upon the true construction of the instrument, it is found that the intention of the parties was that the right of inspection should be a personal right; but, unless you can find something of that nature in the instrument itself, you are not entitled to say that, because an agent is not expressly mentioned, the exercise of the right by an agent is excluded.

We approach, therefore, the consideration of the Partnership Act and of the articles of partnership with this in our minds, that primâ facie whatever right is given to the partners is, unless there is to be found in the Act or the articles something to limit it, capable of being exercised by an agent. Looking at the partnership articles with which we have to deal in the present case, it seems to me that the reasons stated by Story J. in the passage which I have read are very applicable. The general scheme of this partnership was that the

(1) (1886) 32 Ch. D. 337.

management should be placed in the hands of the defendants as managing partners, and that they should have the direct control of the partnership assets and books. The other partners, as appears by the description of them in the articles, are, first, a clergyman who is resident in Canada; secondly, two gentlemen who are medical men at Monmouth; and next a lady who is described as a spinster. On these persons are conferred by the Partnership Act and by clause 16 of the articles rights of access to and examination of, and the right of taking copies and extracts from, any of the books and other partnership documents. All the plaintiffs may be described as being "laymen" as regards those matters. The whole control and management of the business is in the hands of the defendants as the managing partners, and I conceive that, if those rights are to be seriously exercised by the plaintiffs, recourse must be had to the advice and assistance of experts with a view to the proper and beneficial exercise of the rights thus conferred. The rights were conferred for a purpose, namely, that the partners might be able to make themselves acquainted with the affairs of the partnership, and to use the information which they have thus acquired—not, of course, to the detriment of the partnership, or of their fellow-partners—but certainly, so long as the rights of the firm in general or the rights of the other partners are not infringed, with a view to the beneficial use and enjoyment of their own property. It must be remembered that these books and documents, like the rest of the partnership property, are as much those of the plaintiffs as they are those of the defendants. Is there then anything in the Act or in the articles which excludes the right of a partner to avail himself of the assistance of an agent in examining the books and taking copies of them? I cannot find anything. Clause 16 of the articles begins thus: "Proper books of account shall be kept by the managing partners for the time being in which all transactions relating to the partnership business shall be duly entered." That throws on the managing partners the duty of keeping the books. No one would contend that the managing partners are bound to keep the books themselves—that they must make the entries in them with their own hands. It is

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obvious that the managing partners may rightly and properly employ clerks and others to make up the books. Then what is the right which is conferred by clause 16 upon the other partners? "Each of the partners shall have free access to, and liberty to examine and copy, or take extracts from, any of the books and writings of the partnership at all reasonable times." Each partner, therefore, has the right (inter alia) of copying and taking extracts from any of the books and writings of the partnership at all reasonable times. Can it be contended that a partner, who is desirous to avail himself of this right, is bound himself to go and sit in the counting-house of the firm and make the copies and extracts with his own hands? That seems to me unreasonable, and in my opinion he may for the purposes of making those extracts and copies employ a proper clerk or other agent to do the work, just as the managing partners may employ clerks to keep the books.

The question is whether the right of access to and examination of the books is to be limited to the partner personally. I cannot see why it should be. It is said that the introduction of a third person would be inconsistent with that confidence which exists in every partnership relation. No doubt it is a confidential relation; but I cannot see why that should prevent a partner from acquiring for a proper purpose the information necessary to enable him to exercise his own right effectually. I cannot see why, if a clergyman or a doctor desires to obtain, as he is entitled to do, full information as to the transactions of a large brewery in which he is a partner, he must be entirely deprived of all skilled assistance. And indeed it has been practically admitted—at any rate, I have heard no argument to the contrary—that, if a partner succeeded in procuring himself from the books the information which he desires to acquire by his agent, he could immediately go to the agent and submit to him the extracts and copies which he had himself procured and obtain his confidential advice upon them. No doubt the right which a partner has to employ an agent must be subject to some limitation. *Dadswell* v. *Jacobs* (1) shews that it does

(1) 34 Ch. D. 278.

not follow that, because a partner has a right to avail himself of the services of an agent, he may choose as his agent any person he pleases. The agent must be a person to whom no reasonable objection can be taken; and moreover he must, I think, be subject to an obligation not to use the information which he acquires otherwise than for a proper purpose. Indeed, the partner himself would be subject to that obligation, as was pointed out in *Trego* v. *Hunt* (1) by, I believe, nearly every judge who dealt with it, but most clearly by Lord Davey in the House of Lords. He said (2): "The notice of motion asked that the defendant might be restrained from making any copy or extract from the books of the partnership for any purpose other than the business of the partnership. In my opinion the relief asked was misconceived. As well under the general law as under the express provision of the articles of partnership, the defendant was entitled during the partnership to have access to the books and to make copies thereof or extracts therefrom. It is conceivable that, if the defendant proposed to use such extracts for purposes injurious or hostile to the interests of his firm, he might be restrained from so doing. But in such case it would not be the obtaining of the information, but the use the partner proposed to make of it when obtained, which would be restrained." Therefore the partner who obtains information is bound to abstain from using it for an improper purpose. Equally the agent whom he employs to procure the information is under an obligation to abstain from using it for an improper purpose.

In the present case the plaintiffs have nominated a gentleman to whom no objection is offered on the part of the defendants, and that gentleman is, I understand, willing to give an undertaking that the knowledge which he acquires shall not be used for any purpose other than the giving of confidential advice to his employers with regard to their interests. In this way I think the defendants will be fully protected against the only possible injury which they can suggest; and upon that undertaking being given, I think an injunction ought to be granted in the terms of the notice of motion.

(1) [1895] 1 Ch. 462; [1896] A. C. 7. (2) [1896] A. C. 26.

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June 5. The parties having agreed upon terms of compromise, an order was this day made by consent for the taxation of costs as provided by the agreement, and staying all further proceedings in the action except for the purpose of enforcing the taxation.

Solicitors: *Andrew, Wood & Purves, for Powell & Hughes, Brynmawr; Le Brasseur & Oakley, for Le Brasseur & Bowen, Newport, Monmouthshire.*

W. L. C.

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STIRLING J. 1900 *May* 21.

## *In re* CHISHOLM'S SETTLEMENT. *In re* HEMPHILL'S SETTLEMENT. HEMPHILL *v.* HEMPHILL. (1)

[1900 C. 993.]

*Married Woman—Power of Appointment—Restraint on Anticipation—Release of Power—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 52.

A married woman had, under a settlement executed on her marriage in 1872, a life interest in personalty, subject to a restraint on anticipation, with a power of appointment amongst her children:—

*Held*, that under s. 52 of the Conveyancing and Law of Property Act, 1881, she could by deed unacknowledged release her power.

By an indenture of settlement dated July 7, 1866, and made between Eliza Chisholm of the one part and trustees of the other part, certain personal property was settled upon trust for the said Eliza Chisholm for her life for her separate use without power of anticipation, and after her decease upon trust to pay the income or any part thereof for the benefit of any husband of hers who might survive her for his life, or for any shorter period as she might appoint, and subject as aforesaid upon trust for the issue of the said Eliza Chisholm as she should by deed or will appoint, and in default of appointment upon trust for her children who being sons should attain twenty-one or die leaving issue surviving, or being daughters

(1) This case is now reported at large at the request of some eminent conveyancing counsel.

should attain that age or marry, in equal shares. The settlement also contained a covenant by Eliza Chisholm for the settlement of after-acquired property, and a power for her, with the consent in writing of the trustees, to vary or revoke all or any of the trusts or provisions of the same.

By another indenture, dated July 9, 1872, being a settlement made in contemplation of the marriage then intended, and shortly afterwards solemnized, between the said Eliza Chisholm and the defendant C. W. Hemphill, the said Eliza Chisholm appointed that if the said marriage should take effect, and the said C. W. Hemphill should survive her, he should have during the residue of his life such interest as therein mentioned in the income of the property comprised in the first above-mentioned settlement, and the said first-mentioned indenture was, in exercise of the power vested in the said Eliza Chisholm, thereby further varied by providing that the power of appointment by such settlement given to the said Eliza Chisholm among her issue might, during the joint lives of the husband and wife, be exercised by them jointly by deed, and in default of such appointment by the survivor of them by deed or will; and the said Eliza Chisholm thereby released her power of revocation and new appointment under the first-mentioned settlement.

Eliza Chisholm intermarried with C. W. Hemphill on July 10, 1872. There was issue of the marriage nine children only, all of whom were still living, and the eldest of whom was the plaintiff C. P. C. Hemphill, who had attained the age of twenty-one in 1894.

No appointment had been made under any power contained in either of the above-mentioned settlements in favour of the issue of the marriage.

By an indenture dated January 21, 1899, and made between the said C. W. Hemphill and Eliza Hemphill of the first part, the plaintiff C. P. C. Hemphill of the second part, and T. G. Hartland and B. Hartland of the third part, after reciting an intended mortgage by the plaintiff of his interest under the said settlements, the said C. W. Hemphill and Eliza Hemphill released all the property subject to the said settlements from every power of appointment given to the releasing

STIRLING J. parties jointly, or to the survivor of them, or to the said Eliza Hemphill, to the intent that the same might be determined and the property subject thereto might go in default of appointment.

1900

CHISHOLM'S SETTLEMENT, *In re.*

HEMPHILL'S SETTLEMENT, *In re.*

HEMPHILL *v.* HEMPHILL.

Doubts having arisen as to whether the said Eliza Hemphill could validly release her powers under the said settlements, the plaintiff took out the present summons to have it determined whether or not the powers of appointment vested in C. W. Hemphill and Eliza Hemphill under and by virtue of the indentures of settlement dated respectively July 7, 1866, and July 9, 1872, or either of them, had been duly and effectually released by the indenture of January 21, 1899.

By s. 52, sub-s. 1, of the Conveyancing and Law of Property Act, 1881, it is provided that "a person to whom any power, whether coupled with an interest or not, is given may by deed release, or contract not to exercise, the power." By sub-s. 2 this section applies to powers created by instruments coming into operation either before or after the commencement of the Act.

*R. Rowlands*, for the plaintiff. Mrs. Hemphill has validly released her powers under the settlements. She is clearly within s. 52 of the Conveyancing Act, 1881. That section is merely an extension of the powers given to married women by Malins' Act (20 & 21 Vict. c. 57). There does not appear to have been any decision on s. 52; but in Farwell on Powers, 2nd ed. p. 18, the following passage occurs, which, I submit, correctly states the law: "It is submitted that it is always competent to" a married woman "to release her power over personalty vested in possession, and that she may now by deed unacknowledged release her power over any property, whether real or personal, and whether in possession or reversion, and whether she is restrained from anticipation or not, under the provisions of the Conveyancing Act, 1881, s. 52. The word 'person' in the Act includes females as well as males (13 & 14 Vict. c. 21, s. 4); and it appears impossible to say that a married woman is not accurately described as a female person. The Married Women's Property Act, 1882, appears not to

touch the question. It is submitted that a restraint on anticipation cannot affect the married woman's capacity to release her power; it is difficult to see why a veto on alienation to a limited extent should prevent the release and extinguishment of the capacity of alienation by power so far as permitted." A doubt, however, is expressed in Wolstenholme on the Conveyancing and Settled Land Acts, 8th ed. p. 112, as to whether acknowledgment is not necessary in the case of a release by a married woman of a power coupled with an interest. It is submitted that that doubt is not well justified.

*R. J. Parker*, for the trustees of the settlement. Mrs. Hemphill is restrained from anticipation in respect of her life interest. The Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), does not contain any express provision as to incapacity arising from such a restraint. The corresponding Irish Act (4 & 5 Will. 4, c. 92, s. 69) does, however, contain such a provision, and under that Act it has been held that a restraint on anticipation of a life interest would not prevent the release of a power: *Heath* v. *Wickham*. (1) [He also referred to *In re Onslow* (2), *In re Davenport* (3), and *Baggett* v. *Meux*. (4)]

*S. Bligh*, for Mrs. Hemphill.

STIRLING J. It seems to me that the present case is within the words of s. 52 of the Conveyancing and Law of Property Act, 1881, and I can see no sufficient ground for holding that the Legislature did not mean what it said. If it be necessary for me to add anything, I can only say that I concur with the reasoning in the passage which has been cited to me from Farwell on Powers, 2nd ed. p. 18. I hold, therefore, that the release is good.

Solicitors: *Claude S. Lermitte; Crowders, Vizard & Oldham, for Ticehurst & Sons, Cheltenham.*

(1) (1880) 5 L. R. Ir. 285.
(2) (1888) 39 Ch. D. 622.
(3) [1895] 1 Ch. 361.
(4) (1846) 1 Ph. 627, affirming S.C. 1 Coll. 138.

G. A. S.

KEKEWICH J.

1901

*April* 19.

## *In re* BROAD. SMITH *v.* DRAEGER.

[1900 B. 1574.]

*Power—Execution—Document "purporting" to be a Will.*

Under a settlement dated in 1848 a married woman had a power of appointment amongst her children exercisable by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be by her sealed and delivered in the presence of and attested by two or more credible witnesses, or by her last will or testament, "or any writing in the nature of or purporting to be a will or codicil." She signed a written document which was expressed to be her "last will," and which, if valid as a testamentary instrument, would have operated as an execution of the power. This document, having been insufficiently executed, was not admitted to probate:—

*Held*, that although the document might not be "in the nature of" a will, yet, as it clearly "purported to be" the will of the donee of the power it was a valid execution of the power.

ADJOURNED SUMMONS.

By an indenture of settlement dated August 4, 1848 (being the settlement made in contemplation of the marriage of Jane Arthurine Broad and Stephen Gowar), the one undivided sixth share to which Jane Arthurine Broad was entitled of and in the freehold, copyhold, and leasehold estates of her late father, James Broad, devised and bequeathed by his will upon trust for sale and conversion, was vested in trustees upon trust to pay the income arising therefrom to Jane Arthurine Broad during her life, and after her decease to Stephen Gowar if he should survive her, and after the decease of the survivor of them in trust for all and every or such one or more exclusively of the others or other of the children of the said Jane Arthurine Broad by the said Stephen Gowar or any future husband, with such provisions for their respective maintenance, education, or advancement at such age, day, or time, or respective ages, days, or times, if more than one, in such parts, shares, and proportions, and upon such conditions, with such restrictions and in such manner as the said Jane Arthurine Broad should, after

the decease of the said Stephen Gowar, in case she should survive him, by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be by her sealed and delivered in the presence of and attested by two or more credible witnesses, or by her last will or testament or any codicil or codicils thereto, "or any writing in the nature of or purporting to be a will or codicil," direct or appoint, and in default of any such direction or appointment and so far as any such should not extend in trust for the child or children of the said Jane Arthurine Broad by the said Stephen Gowar or any future husband as therein mentioned.

There were five children of the marriage of Jane Arthurine Broad and Stephen Gowar, namely, Arthur Gowar, deceased, the defendants Edmund Gowar, Alexander James Gowar, Edith Gowar (who died an infant), and the plaintiff Marion Arthurine Smith.

Stephen Gowar died on October 23, 1863. Jane Arthurine Gowar survived him and died on December 23, 1899. Previously to her decease she signed a document which was in the words and figures following: "This is the last will of me Jane Arthurine Gowar, of No. 8, Sprowston Road, Forest Gate, in the county of Essex. I bequeath 428*l.* 17*s.* 9*d.* Consolidated Bank of England Stock 2¾ per cent. as follows: To Edmund Gowar, 300*l.*; to Alexander James Gowar, 50*l.*; to Marion Arthurine Smith, 78*l.* 17*s.* 9*d.* I further bequeath to my daughter Marion Arthurine Smith the one-sixth part of rents of which I am entitled through my father's will, in trust, situate at Cambridge, in the county of Cambridgeshire; Badingham, in the county of Suffolk; Brentford, in the county of Middlesex; Coombe, in the county of Oxfordshire. The said Marion Arthurine Smith to pay quarterly to her brother Alexander James Gowar the fourth part of such rents during his lifetime, and after his death to his wife Florence during her lifetime, and after her death to go to Marion Arthurine Smith. My furniture, books, plate-glass, china, pictures, and ornaments I leave for my sister Ann Broad's use during her lifetime, and after her death to be divided equally between my three children, Edmund Gowar, Alexander James Gowar, Marion Arthurine

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Smith and their heirs, now in the possession of my son Edmund. My wardrobe and trinkets I leave to my daughter Marion Arthurine Smith. As witness my signature, Jane Arthurine Gowar. This fifteenth day of November, one thousand eight hundred and ninety-five, 8, Sprowston Road, Forest Gate, Stratford, E. Witness to my signature, Harriet Dickinson, senior, 8, Sprowston Road, Forest Gate, Essex, November 19, 1895. Witness to my signature, Harriet Dickinson, junior, 8, Sprowston Road, Forest Gate, Essex, November 19, 1895."

The two witnesses named Harriet Dickinson made an affidavit to which the document was annexed as an exhibit, and thereby deposed that the deceased "did not sign her name as it now appears in the testimonium clause of the said document in our presence, nor did she declare such signature to be the signature to her will, nor did she refer in any way to the nature of the document. The said deceased merely placed the said document before us, and asked us to sign it; whereupon we both consented, and respectively signed our names and addresses as they now appear in the presence of the said deceased, and we further say that there was no other person present at the same time besides ourselves."

Jane Arthurine Gowar did not make any other disposition of a testamentary character.

Under these circumstances the document of November 15, 1895, was not admitted to probate.

This summons was taken out by Marion Arthurine Smith, as plaintiff, against George Frederick Draeger, the present trustee of the settlement of August 4, 1848, Ellen Florence Gunn, the legal personal representative of Arthur Gowar, deceased, Edmund Gowar, Alexander James Gowar, and Florence Gowar, the wife of Alexander James Gowar, as defendants, for the determination (inter alia) of the question whether the document of November 15, 1895, was a valid execution of the power conferred on Jane Arthurine Gowar, deceased, by the settlement of August 4, 1848. It was not disputed that upon the true construction of the document of November 15, 1895, it would, if it had been valid as a testa-

mentary instrument, have operated as an execution of the power of appointment conferred by the settlement of 1848, to the extent to which it affected to benefit objects of the power.

*Warrington K.C.*, and *T. B. Napier*, for the plaintiff. The power of appointment conferred by the settlement of August 4, 1848, was duly exercised by the document of November 15, 1895. There is no technical rule of law affecting the execution of a power, and it is competent to the donor of a power to direct that it shall be executed in any manner or by any formality he may think fit.

[KEKEWICH J. I do not think that can be disputed.]

Although the document of November 15, 1895, was not admitted to probate, it was evidently intended by the donee of the power to operate as a testamentary instrument. It may, therefore, be said to be "in the nature of" a will; but, if not, it is at any rate a document "purporting" to be a will within the meaning of the power.

[They referred to *Barretto* v. *Young* (1); *Hummel* v. *Hummel* (2), and *D'Huart* v. *Harkness*. (3)]

*Sheldon*, for the defendant George Frederick Draeger, the trustee.

*Buckmaster*, for the defendant Ellen Florence Gunn. The document of November 15, 1895, is a mere unattested writing which, it is submitted, cannot operate as an execution of the power contained in the settlement. The expression "purporting to be a will" as used in the settlement appears, regard being had to the context and the formalities thereby required, to point to an instrument having a testamentary effect, and ought not to be construed as including such a document as this, if the Court can put upon it any interpretation which is more in harmony with the general requirements of the power. Many instances may be given of documents having a testamentary effect, and nevertheless aptly described as "purporting" to be a will or codicil, as, for example, the will of a married woman under the old law. It is to be observed that

(1) [1900] 2 Ch. 339. (2) [1898] 1 Ch. 642.
(3) (1865) 34 Beav. 324.

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the settlement is dated in 1848, so that the word "purporting" may be reasonably referred to such a will. So again a deed admitted to probate, as in *Milnes* v. *Foden* (1), would be within the words of the power, or any of the numerous class of documents admitted to probate which are not wills or codicils but are designated as "scripts."

*P. O. Lawrence, K.C.*, and *Percy Wheeler*, for the other defendants. In Sugden on Powers, 8th ed. p. 230, it is stated that the law is clear that where a power is given to be executed by "any writing in the nature of a will" those words "mean the same as a will," and a testamentary instrument is required, and *Longford* v. *Eyre* (2) and other cases are cited as authorities to that effect. The words "purporting to be a will" do not carry the matter further: they indicate the same thing, namely, an informal instrument having a testamentary effect and capable of being admitted to probate. [He referred to *In re Kirwan's Trusts* (3) and Farwell on Powers, 2nd ed. p. 173.]

KEKEWICH J. The question in this case, which appears to be of first impression, is as to the meaning of the words "purporting to be a will or codicil." The peculiarity of the case is that the instrument creating the power contemplates the execution of it first by a deed or writing not being testamentary, then in the next place by a will or codicil—that is to say, by a regular testamentary instrument, one which not only is in the nature of and purports to be, but which in a legal sense is, the will of the testator. But then the settlor is minded to extend the scope of the power, and he does so by saying that it may be exercised "by any writing in the nature of or purporting to be a will or codicil." To say that those words mean only a will or codicil is to destroy the effect of that addition. Whoever framed this instrument must have intended that these alternative words should refer to something different from the deed or writing which is referred to in the first clause, or the will or codicil which is referred to in the second clause, and if the third clause is confined to a will or testamentary instrument

(1) (1890) 15 P. D. 105. (2) (1721) 1 P. Wms. 740.
(3) (1883) 25 Ch. D. 373.

capable of operating as a will it adds nothing to the first and second clauses. That is a strong argument against so limiting it. There is authority, and strong authority, for holding that a writing "in the nature of" a will must be a will in the strict sense of the word. The passage referred to by Mr. Lawrence in Lord St. Leonards' work on Powers, 8th ed. p. 230, and the cases there referred to, go far to establish that proposition. If, therefore, I had here only the words "in the nature of," without the words which follow, I should probably be bound by the authorities, and, notwithstanding the difficulty of construction to which I have adverted, be obliged to say that the document of November 15, 1895, was not an instrument of the kind indicated by the power, and was therefore not an execution of the power. But then the framer of the instrument creating the power has added these words, "or purporting to be." What is the meaning of the expression "purporting to be" a will or codicil? Mr. Buckmaster has endeavoured to enumerate the documents which would come within the terms of this power, but I am not satisfied that his enumeration is complete. I think, however, that the terms of the power would extend to a document in the nature of a will made by a man who intended simply to exercise the power and to make no further disposition, so that the document would not be a will in the ordinary sense, though clothed in the language and accompanied with the formalities characteristic of a will. That would, I think, be a good example of a document purporting to be a will. But the question here is whether a document which is in form and substance a will, but which, because it was not duly executed as such, fails to be a will, in a legal sense, is or is not a document which "purports" to be a will. In the Century Dictionary I find under the verb "purport" this: "To convey to the mind as the meaning or thing intended; imply; mean, or seem to mean: as, the document *purported* to be official." That is an excellent instance and useful by way of illustration, for one might have an office copy of an affidavit on the Court paper, and yet if it did not bear the official stamp the Court would not admit it, because, although "purporting" to be an official document, it would not really be one. The quotations given

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by the Dictionary are not so precisely in point, but there is one good one which I will read: "I do not believe there ever was put upon record more depravation of man, and more despicable frivolity of thought and aim in woman, than in the novels which *purport* to give the picture of English fashionable life." If that is the real meaning of the word "purport," why does not this document "purport" to be a will? It is true that there is no residuary bequest, and no appointment of executors; and those, no doubt, are two things for which one looks in considering whether a document is intended to be a will. But in disposing of the Consols the deceased lady uses the word "bequeath," and in purporting to dispose of this particular property she again uses the word "bequeath," which is a technical word properly used in a will and in no other instrument. It is to be observed that though there is no residuary gift she disposes of furniture and other articles, and in reference to them uses the word "leave." That word, though not perhaps so strictly applicable to a will only as the word "bequeath," points in the same direction. The same observation applies to the gift of the wardrobe and trinkets, a sort of gift which one very often finds in a will, but, I think, never elsewhere. This document, therefore, is on the face of it a disposition of property made in contemplation of death, and it only fails to be a will because the maker of it did not comply with the requirement of the Wills Act that the witnesses should be present when she signed it. I think, therefore, I must hold that this document of November 15, 1895, is one which "purports" to be a will. If it is, it is not disputed in argument that it was a good execution of the power created by the settlement of August 4, 1848, except so far as it confers an interest on a person who was not an object of the power. There must, therefore, be a declaration that to the extent I have mentioned the power was well executed by this document.

Solicitors: *W. A. Bilney; Lovell, Son & Pitfield; Brown & Aylen; E. Dean.*

C. C. M. D.

## *In re* MANNESMANN TUBE COMPANY, LIMITED. VON SIEMENS *v.* MANNESMANN TUBE COMPANY, LIMITED.

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*May* 9.

[1898 M. 3452.]

*Company—Winding-up—Preferential Payments—Debenture-holders' Action—Receiver in Possession—Poor and District Rates—Water Rate Payable by Meter—Apportionment—Preferential Payments in Bankruptcy Act*, 1888 (51 & 52 *Vict. c.* 62), *s.* 1, *sub-s.* 1 (*a*)—*Preferential Payments in Bankruptcy Amendment Act*, 1897 (60 & 61 *Vict. c.* 19), *ss.* 2, 3.

On November 9, 1898, holders of debentures of a company commenced an action to enforce their security, and a receiver was appointed. The debentures were a charge on the undertaking of the company and its property present and future. On December 1, 1898, the company went into liquidation. In January, 1899, the receiver paid poor-rate and district rate made in October, 1898, and water rate, which was payable according to meter. He claimed to be recouped these payments as preferential payments under the Preferential Payments in Bankruptcy Act, 1888, and Amendment Act, 1897:—

*Held*, that the question being one between mortgagor and mortgagee, not between successive occupiers, and the poor-rate and district rate being due from the company at the date of the commencement of the winding-up, the liquidators must pay the whole amounts out of the general assets of the company; but that the water rate was not due until the water was supplied, and must be apportioned, the liquidators paying only so much as was due at the date of the commencement of the winding-up.

SUMMONS by the plaintiffs in an action by debenture-holders of the company to enforce their security, for directions that the whole or some, and if so what part, of certain sums paid by the receiver in the action to creditors of the company ought to be claimed under the Preferential Payments in Bankruptcy Act, 1888, and the Preferential Payments in Bankruptcy Amendment Act, 1897, by the receiver from the liquidators of the company, and for liberty for the receiver to apply in the winding-up of the company for payment to him by the liquidators of the sums so directed to be claimed.

The debentures took effect as a floating charge upon the undertaking of the company and all its property whatsoever and wheresoever, both present and future.

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The action was commenced on November 9, 1898, and on the same day a receiver and manager on behalf of the debenture-holders was appointed with power to act at once. On December 1, 1898, at an extraordinary general meeting of the company, the company passed a resolution for voluntary winding-up, and by an order of Wright J. on March 11, 1899, the voluntary winding-up was directed to be continued under the supervision of the Court. Among the payments claimed by the receiver under the Preferential Payments in Bankruptcy Acts (1) were the following: (1.) 191*l.* 10*s.*, paid January 14, 1899, for "poor-rate made October 15, 1898"; and (2.) 206*l.* 2*s.* 8*d.*, paid January 23, 1899, to the Swansea Corporation, for "district rates and water rates, October 4, 1898." The question raised by the liquidators was whether these payments should be apportioned in the same way as would have been done if

(1) Preferential Payments in Bankruptcy Act, 1888, s. 1, sub-s. 1: "In the distribution . . . . of the assets of any company being wound up under the Companies Act, 1862, and the Acts amending the same, there shall be paid in priority to all other debts: (*a*) All parochial or other local rates due from . . . . the company at the date of . . . . the commencement of the winding-up, and having become due and payable within 12 months next before that time . . . ."

Preferential Payments in Bankruptcy Amendment Act, 1897, s. 2: "In the winding-up of any company under the Companies Act, 1862, and the Acts amending the same, the debts mentioned in section one of the Preferential Payments in Bankruptcy Act, 1888, shall, so far as the assets of the company available for payment of general creditors may be insufficient to meet them, have priority over the claims of holders of debentures or debenture stock under any floating charge created by such company, and shall be paid accordingly out of any property comprised in or subject to such charge."

Sect. 3: "In case a receiver is appointed on behalf of the holders of any debentures or debenture stock of a company secured by a floating charge, or in case possession is taken by or on behalf of such debenture-holders of any property comprised in or subject to such charge, then and in either of such cases, if the company is not at the time in course of being wound up, the debts mentioned in section one of the said Preferential Payments Act shall be paid forthwith out of any assets coming to the hands of the receiver, or other person taking possession as aforesaid, in priority to any claim for principal or interest in respect of such debentures or debenture stock. And the periods of time mentioned in the said Act shall be reckoned from the date of the appointment of the receiver or possession being taken as aforesaid, as the case may be. But any payments made under this section shall be recouped as far as may be out of the assets of the company available for payment of general creditors."

there had been a change of occupation on November 9, 1898. They did not object to repay that part of the payments which represented the period before the receiver went into possession. The amount payable for water was regulated by meter.

*O. L. Clare*, for the summons. With regard to the first item, the poor-rate, it is made in advance. The whole of the rate was therefore due at the date of the commencement of the winding-up, and is clearly a preferential debt within s. 1, sub-s. 1 (*a*), of the Act of 1888. The receiver has paid the rate as, having regard to s. 2 of the Act of 1897, he was bound to do; but under s. 3 he is entitled to be recouped out of assets of the company not comprised in the debentures. In this case there are assets available for general creditors.

It is not a case for apportionment as if it were a question between successive tenants. The liquidators are liable to pay the whole rate: *In re Thomas* (1), *In re Wearmouth Crown Glass Co.* (2), and *In re Marriage, Neave & Co.* (3)

The rate is a liability of the mortgagors, the company, not of the debenture-holders, and there is nothing which shews that the liability of the company ceased on the appointment of the receiver. The debenture-holders can either add what they have paid to their security, or else obtain repayment under the Act.

*Arthur Sims*, for the liquidators. If when a company goes into liquidation the liquidator follows the company in possession there is a continuous occupation; but that was not so in this case. There is the possession of the receiver, which is a different occupation altogether. The receiver was appointed in the action, not under a deed; so he is not the agent of the mortgagors. He entered into possession to secure and maintain the property for the mortgagees, not for the company. The benefit of the occupation up to the time of the receiver being appointed was the company's, and the company admit their liability for the rate up to that time. After that the company had no benefit of occupation, and they deny any

(1) (1887) 57 L. J. (Q.B.) 39. (2) (1882) 19 Ch. D. 640.
(3) [1896] 2 Ch. 663.

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liability. If the receiver had paid a rate the whole benefit of which the company had had, the company would have had to recoup him under s. 3 of the Act of 1897. That section does not mean that where there has been a beneficial occupation by the receiver the proportion of rates for the period after his occupation commenced is to be paid by the company. That part of the rates should be paid by the mortgagees out of their security, and if there is any deficiency in the security the mortgagees should prove for it in the winding-up.

[KEKEWICH J. Do you admit that the poor-rate was due from the company at the date of the commencement of the winding-up?]

I cannot say that it was not.

*O. L. Clare* was not called upon to reply.

KEKEWICH J. All that I have to consider is what are the provisions of the Acts, and now that the matter has been threshed out I do not see any difficulty at all.

The Act of 1888 does not deal with debenture-holders. It deals only with the priority of debts in the distribution of the property of a bankrupt, and in the distribution of the assets of a company which is being wound up. I have to deal with a winding-up, and I am asked to make an order with regard to a rate due from the company at the date of the commencement of the winding-up. Mr. Sims admitted that he could not argue that the poor-rate was not due from the company at the date of the winding-up. It is, therefore, a preferential debt under the statute. Then comes the Act of 1897, which deals with questions arising between a company and debenture-holders, between whom there is often a conflict by reason of the debenture-holders having a claim in priority over the assets. Sect. 2 of that Act only provides that preferential claims are to have priority as against the debenture-holders, and the receiver must pay them out of the assets subject to the debentures—it is a settled form of order that the receiver do pay preferential debts out of the assets in his hands. The Act, however, goes on to provide that that is not to disturb the relative positions of the parties as mortgagor and mortgagee. The mortgagees

not being in possession, the rate is made against the mortgagors, the company, and the company must pay it so far as they can. If they cannot pay, then unfortunately the debenture-holders must suffer; but any payments made by the receiver on this account are to be recouped out of the general assets of the company if any are available.

The result is that the whole of this rate ought to be repaid as a preferential payment on the ground that it was due from the company at the date of the commencement of the winding-up. I can see no reason for apportionment. There is no question of the occupation of the company or the occupation of the receiver. The question is as between mortgagor and mortgagee: the mortgagors being liable to pay, the mortgagees are to be recouped what they have paid on behalf of the mortgagors, the company.

I hold that the liquidators must pay the whole of the poor-rate.

*Clare.* As regards the second item, the district rate is in the same position as the poor-rate.

*A. Sims.* I do not dispute that.

*Clare.* The water-rate is in a different position. The rent of the meter is payable in advance; so that rent, and the rate for water used before the winding-up, must be paid by the liquidators, as they were debts due at the date of the commencement of the winding-up. The rate for the water supplied afterwards was not due at that time, and cannot be claimed as a preferential payment.

KEKEWICH J. That is so. The payment for water is not due until the water is supplied. Only an apportioned part of the water rate is payable by the liquidators.

Solicitors: *Budd, Johnsons & Jecks; H. G. Campion & Co.*

C. C. M. D.

BYRNE J.

1901

*Jan.* 14, 15, 16; *April* 23.

## DEBENHAM *v.* SAWBRIDGE.

[1900 D. 330.]

*Vendor and Purchaser—Sale by the Court—Conditions of Sale—Mistake—Misdescription — Compensation — Defect of Title—Rescission after Conveyance.*

On a sale by the Court of property described in the particulars as freehold stabling with dwelling rooms over, one of the conditions provided that if any error or misstatement should appear to have been made in the particulars of sale or conditions, it should not annul the sale, but compensation, to be settled by the judge in chambers, should be made in respect thereof: the property was conveyed to the plaintiff, the purchaser, in October, 1897, and the purchase-money was paid into court, and the bulk of it distributed among the beneficiaries. A year after completion it was discovered that some of the dwelling rooms over and a cellar underneath a portion of the property belonged to third persons, and the plaintiff eventually had to pay 300*l.* to acquire a title to these dwelling rooms. In February, 1900, the present action was commenced against the vendor trustee and the beneficiaries, claiming compensation for the errors and misstatements in the particulars and conditions of sale, or, in the alternative, to set aside the sale on the ground of common mistake, and obtain repayment of the purchase-money:—

*Held*, that the plaintiff was not entitled to compensation under the above condition of sale, which did not, and was not intended to, apply to the case of a defect of title, but only to error or misstatement in the subject-matter of the sale; that, even assuming there had been a common mistake, and assuming that there need not be a total failure of consideration to justify rescission after conveyance, the error made in the present case was not sufficient to justify rescission, and that the plaintiff's action therefore failed and must be dismissed.

TRIAL OF ACTION.

The object of this action was to obtain compensation for alleged errors and misstatements in particulars and conditions of sale, or, in the alternative, to set aside the sale and conveyance of the property and obtain repayment of the purchase-money. The facts, and the result of the evidence as found by the Court, were as follows:—

In July, 1897, freehold stabling with dwelling rooms over in Mason's Yard, Duke Street, St. James', in the county of Middlesex, was put up for sale by auction under an order of

Court in a partition action of *Norton* v. *Norton*; the particulars described the property as Nos. 21 and 22, Mason's Yard, and as including (so far as material), "Dwelling over No. 21, containing on the first floor a sitting-room fitted with range and cupboards in recesses, and a back landing with iron door in party wall communicating with No. 22. On the second floor, a front room and a back room or kitchen with range and cupboard, sink and pump." The whole was described as being "Let to Mr. William Rice, trading as Messrs. Smith & Co., job-masters, by lease dated 3rd May, 1897, for a term of fifteen and a quarter years from the 25th March, 1897, determinable by lessee at end of the first eight years on giving six months' notice." At the foot of the particulars it was stated that an abstract or copy of the lease would be produced at the sale, and might be previously inspected at the office of the vendor's solicitor. Accompanying and affixed to the particulars and conditions of sale was a plan, shewing No. 21 as consisting of two coach-houses, and across was printed, "First and second floor dwelling over," with arrows denoting that the first and second floor dwelling extended over the whole width of No. 21. This plan contained the following note: "This plan is published to shew the position of the property, but its accuracy is in no way guaranteed."

The material conditions of sale were:—

"(9.) If any error or misstatement shall appear to have been made in the particulars of sale or these conditions, such error or misstatement is not to annul the sale, or entitle the purchaser to be discharged from his purchase, and a compensation is to be made to or by the purchaser as the case may be, and the amount of such compensation is to be settled by the judge at chambers.

"(10.) The property for sale is described in the existing lease, and no question shall be permitted as to the identity or quantity of the premises described therein and in the particulars of sale with the premises described in the previous documents abstracted, although the descriptions are not exactly the same. The property is sold subject to such tenancy, tenants' rights and rights of way, wall fence, light, and water and other

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easements, if any, and public outgoings as may affect the same, and the purchaser shall be taken to have had notice thereof, and of the state of the premises though not expressly mentioned, and any previous tenancy appearing in the title shall be considered at an end.

"(11.) The sale being under an order of the Court, no person beneficially or equitably interested shall be required in that character to join in the sale by assurance, neither shall the vendor be bound to produce evidence relating to the dealings of any such party not in the possession or power of the vendor, and the assuring party or parties will be bound to convey only as trustee or trustees, and all facts or matters admitted, proved, stated, or proceeded on, in the above-mentioned action, or certified by the master, shall be deemed thereby conclusively evidenced."

The plaintiff was the purchaser at the sale for 3810*l.*, which was duly paid into court to the credit of the action of *Norton* v. *Norton*; and in October, 1897, the whole of the hereditaments so offered for sale were expressed to be conveyed to him in fee simple by the defendant Sawbridge as trustee, without covenants for title. The plaintiff signed a consent in writing admitting that he had received a conveyance of the hereditaments mentioned in the particulars, and consenting to the distribution, or application, of the purchase-money, which he had paid into court, in any manner the Court might authorize. Under the order made after this consent, the costs of the action of *Norton* v. *Norton* were paid out of the purchase-money, and the residue, after providing for duty, was, with the exception of one-sixth, which was carried over to a separate account to the credit of an infant, paid out to, or distributed among, the beneficiaries, in accordance with the master's certificate.

In November, 1898, an action was commenced by Earl Beauchamp against Rice, the tenant, to recover possession of the rooms over No. 21, which the plaintiff obtained leave to defend, and which was ultimately settled by Rice paying six years' arrears of rent to the Earl, and by the plaintiff purchasing the rooms in dispute from the Earl for 300*l.*, and paying some 75*l.* for costs. It was not disputed at the trial that these

rooms did not at the time of the sale form part of the property the subject of the action of *Norton* v. *Norton*, but belonged to Earl Beauchamp. The plaintiff also discovered about this time that there was a cellar underneath No. 21, forming part of a range of cellarage, entered only from a trap-door situate in the mews, some distance away from No. 21, and not divided from the rest of the cellarage under the other houses, and, although it was not known exactly to whom the cellarage belonged, the Court considered it pretty clear that it formed no part of the property the subject of the action of *Norton* v. *Norton*.

In February, 1900, the plaintiff commenced the present action against the defendant Sawbridge, the trustee, and the beneficiaries, claiming compensation under the ninth condition of sale from the defendant Sawbridge for the errors and misstatements in the particulars and conditions of sale in respect of the dwelling rooms over and the cellar underneath No. 21, Mason's Yard, or, alternatively, from the other defendants as beneficiaries, and also claiming, in the alternative, to set aside the conveyance of October, 1897, by reason of the said common mistakes, and to be repaid his purchase-money with interest.

The Court found as a fact that the existence of the cellar was unknown to any of the parties to the action until some time after the conveyance to the purchaser had been executed; and that there was no suspicion of its existence in the minds of the master, the conveyancing counsel to the Court, the solicitors acting in the matter, or of any one concerned at any time prior to the completion of the sale. It further appeared that the only entrance to the rooms over No. 21, except through the iron door in the party wall between Nos. 21 and 22, was from a passage, the access to which was obtained by means of a staircase behind No. 17 in the mews, this passage running past the level of the rooms over several sets of stabling, from which the rooms in question were entered, and that there was no communication between the coach-houses on the ground floor of No. 21 and the rooms above. The Court also found it to be absolutely clear that there had been no fraud or intentional deception on the part of any one, and that every one

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concerned in the conduct of the sale and in the preparation of the particulars and conditions had acted with perfect good faith throughout.

All the proceedings in chambers before the master, and all the instructions laid before the conveyancing counsel to the Court with his opinions thereon, were carefully examined and criticized in Court, as were also the abstracts, requisitions, and answers, with the result that the Court found as a fact, that all concerned in the sale believed, and had reasonable ground for believing, that a good title could be made to the dwelling rooms over No. 21, subject to a doubt which might be fairly provided against by condition.

The following are the circumstances under which the particulars and conditions of sale were prepared.

Draft particulars of sale with abstract of title and instructions were duly laid before the conveyancing counsel: the Court considered that these instructions were most clear, and reflected credit on the gentleman who prepared them. There appeared to be a considerable difficulty in identifying the property the subject-matter of the action of *Norton* v. *Norton*, so far as regarded No. 21, and particularly with reference to the dwelling rooms over the coach-houses; it also appeared that Mr. William Rice, the tenant, was in occupation, by his manager, of the whole of Nos. 21 and 22, including all the rooms over. He held also several other tenements in Mason's Yard. He had taken from the trustees of one Smith, in 1890, assignments of several leasehold properties in Mason's Yard, including that comprised in a lease dated August 31, 1870, made between the predecessors in title of the parties to the action of *Norton* v. *Norton*, and William Seymour, whereby certain property was demised to Seymour for twenty-one years from June 24, 1870, at the rent of 200*l.* a year. The parcels in this lease expressly included the rooms over No. 22, and made no mention of rooms over No. 21, but they appeared to include part, if not all, of the ground floor of that tenement. There was a small plan on this lease, not, however, incorporated in the description, which appeared to include part, but not the whole, of the site of No. 21. The term granted by

this lease having come to an end in June, 1891, a fresh lease was granted to Rice, dated June 26, 1891, of premises by the same description as in the former lease, for twenty-one years from June 24, 1891, at a rent of 200*l.* a year. There was no plan upon this lease. Rice never paid rent to any person for the rooms over No. 21 (unless the rent of 200*l.* a year included rent for them), and he had so informed the vendor's solicitors. There were other matters, all of which were fully detailed in the instructions before mentioned, for rendering it a matter of serious doubt whether any portion of No. 21, but especially whether the rooms over, were the vendor's property; and, in advising, the conveyancing counsel said: "Upon the whole, on the above carefully prepared statement, I am of opinion that the coach-house and harness room in question" (No. 21) "are most probably part of the trust estate, but not the rooms over the same, with any certainty, and that an adverse claim might at any time arise to them for some years to come; so the conditions and particulars of sale must be accordingly." In the particulars as then settled a note appeared: "Note. The dwelling rooms over the eastern coach-houses, harness room, and way thereto and the five-stall stable, do not certainly form part of this property for sale. . . . ." Amongst the conditions as originally settled was one (No. 7) mentioning the fact that there was some doubt as to the exact extent of the property comprised in the title as mentioned in the particulars of sale, and providing that, as to such part of the property as to which there was any such doubt, the purchaser should accept a conveyance from the vendor so far only as he could make the same. Condition 10, as originally settled, provided for a declaration by the tenant that the premises for sale had been held in conformity with the title, as deduced, for twenty years, and precluding any question as to identity or quantity. The matter subsequently came before the master, when he directed that an endeavour should be made to arrange with Mr. Rice to take a new lease at the old rent of all the property proposed to be included in the sale, and, after this course had been approved in conference with the conveyancing counsel, negotiations were entered into, resulting in an acceptance by the tenant of a new

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lease, dated May 3, 1897, by a description clearly including the whole of the property. The master then considered that the grant of the new lease would probably enable counsel to modify condition 7, and the statement in the particulars as to its being uncertain whether parts of the property were included, and he expressed a view that it was desirable they should be modified if possible. The solicitors to the parties having the conduct of the sale did not see their way to getting the declarations mentioned in condition 10, or in the observation in the margin of the former instructions. The rate-books had been examined by the solicitor to see if Earl Beauchamp was entered as owner of the rooms; but it was discovered that in 1885, a time when the lease of 1870 was running, Earl Beauchamp was entered as owner of No. 18, described as a coach-house, but not as owner of any other premises in the yard. These fresh facts were clearly stated in further instructions laid before the conveyancing counsel, who then resettled the particulars and conditions of sale in their present form, and added to his former opinion: "On my further instructions I am able to withdraw this observation" (an observation that he thought the attention of the chief clerk should be drawn to his very special instructions and his notes thereon, and in accordance with which the particulars and conditions had been settled), "and have resettled the particulars and conditions in accordance therewith, and as suggested by the master, in which suggestion I cordially agree, and the sale may proceed upon this." This opinion was dated May 14, 1897, and the sale then took place in due course. An abstract was furnished and examined, requisitions were made and answered, and the title was accepted, after which the sale was duly completed. The only requisition calling for notice is part of the sixth, which was: "What was the object of granting this lease (referring to the lease of 1897) for a concurrent term with the then subsisting lease of 1870?" (meaning 1891). To which the reply was: "The lease was granted with the sanction of the Court in the action." The purchaser was apparently satisfied with this answer. It also appeared that a letter was written to Mr. Rice, the tenant, making some inquiry as to his tenancy, but this was never received, or replied to,

and a clerk was also sent to inquire of him, but the clerk only saw some person on the property who could give no information, and then this matter also was dropped.

*Levett, Q.C.*, and *MacSwinney*, for the plaintiff. The particulars were wrong in describing the rooms over the coach-houses as part of the trust estate of *Norton* v. *Norton*, and now that it turns out that these rooms never were part of this trust estate, the plaintiff is entitled to compensation for this error or misstatement under condition 9. Compensation under a condition of this kind can be obtained after conveyance: *In re Turner and Skelton* (1); *Palmer* v. *Johnson* (2), in both of which *Manson* v. *Thacker* (3) is disapproved. In *Clayton* v. *Leech* (4) there was no contract as to compensation, as there is here; and in *May* v. *Platt* (5) the mistake was unilateral; in the present case there has been a common mistake which is apparent on the face of the conveyance, which purports to convey to the plaintiff property which the vendor never possessed; on the ground, therefore, of common mistake, the plaintiff is entitled to have the conveyance set aside, and to recover his purchase-money—*Bingham* v. *Bingham* (6)—even though there has been no fraud: *Cooper* v. *Phibbs* (7); *Jones* v. *Clifford*. (8) Misleading conditions on a sale by the Court are never enforced: *Else* v. *Else* (9); *In re Banister*. (10) The plaintiff is, therefore, entitled either to compensation under condition 9, in which case there must be an inquiry, or to rescission and repayment of his purchase-money with interest.

*Norton, Q.C.*, and *Austen-Cartmell*, for the defendant Sawbridge, the trustee. Conditions providing for compensation for misdescription do not apply to cases where there is no title or a defective title: *Thomas* v. *Powell* (11); *Cann* v. *Cann*. (12) Except in the case of fraud, the purchaser cannot

(1) (1879) 13 Ch. D. 130.
(2) (1884) 13 Q. B. D. 351.
(3) (1878) 7 Ch. D. 620.
(4) (1889) 41 Ch. D. 103.
(5) [1900] 1 Ch. 616.
(6) (1748) 1 Ves. Sen. 126.
(7) (1867) L. R. 2 H. L. 149.
(8) (1876) 3 Ch. D. 779.
(9) (1872) L. R. 13 Eq. 196.
(10) (1879) 12 Ch. D. 131.
(11) (1794) 2 Cox, 394; 2 R. R. 86.
(12) (1830) 3 Sim. 447; 30 R. R. 184.

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obtain rescission after conveyance: *Clare* v. *Lamb* (1); *Brownlie* v. *Campbell* (2); the purchaser's only remedy after completion is on the covenants for title: *Soper* v. *Arnold*. (3) A defect in title is not a misdescription in the particulars.

[BYRNE J. referred to *In re Beyfus and Master's Contract*. (4)]

*Bingham* v. *Bingham* (5) can only be supported on the ground that the purchaser there bought his own property; and in *Cooper* v. *Phibbs* (6) the contract was not completed. *Bingham* v. *Bingham* (5) has been considered in *Huddersfield Banking Co.* v. *Henry Lister & Sons* (7) and in *Stewart* v. *Stewart*. (8) Contracts for compensation must be construed strictly: if this condition applies at all, compensation can only be obtained in the manner therein provided: this cannot now be done; the purchase-money, all but one-sixth, has been distributed. This defendant is the barest of trustees, not even a trustee for sale; it was a sale by the Court; he cannot, therefore, be made liable to pay compensation or refund the purchase-money. The conditions of sale were perfectly fair: *Nunn* v. *Hancock*. (9) [*Beioley* v. *Carter* (10) was also referred to on this point.]

*Rowden, Q.C.*, and *W. M. Cann*, for some of the beneficiaries, claimed the benefit of the previous argument, and cited *Ex parte Riches* (11), where it was decided that a condition similar to condition 9 did not apply to a defect in title.

*H. Newson*, for other beneficiaries, also claimed the benefit of the previous arguments, and called the attention of the Court to the fact that the plaintiff, as purchaser, had signed a consent to the distribution of the purchase-money among the beneficiaries, and that he was, therefore, estopped from now claiming repayment of his purchase-money or compensation.

*Levett, Q.C.*, in reply. The conditions ought to have stated

(1) (1875) L. R. 10 C. P. 334.
(2) (1880) 5 App. Cas. 925, 937.
(3) (1887) 37 Ch. D. 96.
(4) (1888) 39 Ch. D. 110.
(5) 1 Ves. Sen. 126.
(6) L. R. 2 H. L. 149.
(7) [1895] 2 Ch. 273.
(8) (1839) 6 Cl. & F. 911; 49 R. R. 267.
(9) (1871) L. R. 6 Ch. 850.
(10) (1869) L. R. 4 Ch. 230.
(11) (1883) 27 Sol. J. 313.

that there was some doubt as to the title of these rooms over the coach-houses, and provided for this by a special condition, which would have given the purchaser fair warning. As it is, an "error" was made by stating that these rooms were included. The defendant Sawbridge is properly made a party: his is the hand to collect and get back the purchase-money or compensation. Contracts for compensation must be construed strictly against the vendor; the officer of the Court has not been sufficiently careful in the preparation of these conditions; a mistake has been made, and the plaintiff is entitled to compensation or rescission. *Clare* v. *Lamb* (1) was a common law action founded on a failure of the consideration. In *May* v. *Platt* (2) the mistake was unilateral. *Brownlie* v. *Campbell* (3) was a case in which the purchaser was to take the property with all risks; and it is a dictum only that the defendants rely on. *Ex parte Riches* (4) is distinguishable.

*Cur. adv. vult.*

April 23. BYRNE J., after stating the facts and the result of the evidence as above, and observing that, as the action was one to set aside a sale by the Court, it was necessary to go into the circumstances at greater length than usual, because it was important to see that every detail in the title had been fully considered by the officers of the Court, continued:—In my opinion the purchaser is not entitled to claim compensation under the ninth condition, inasmuch as it does not, and is not intended to, apply to the case of a defect of title, but only to error or misstatement in the description of the subject-matter of the sale, such, for example, as an error in quantity or nature or tenure or amount of the vendor's interest. In the present case there is no error or misstatement in the description of the property; the real complaint is that no title can be shewn to a part of the property so described. In 27 *Solicitors' Journal*, at p. 313, there is a note of a case *Ex parte Riches*, which does not appear in any of the regular reports, but the note itself appears to be full and careful, and I see no reason to doubt its

(1) L. R. 10 C. P. 334.
(2) [1900] 1 Ch. 616.
(3) 5 App. Cas. 925, 937.
(4) 27 Sol. J. 313.

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accuracy. In that case a question arose as to the effect of a condition for compensation contained in a contract for sale of real estate. Property described as freehold was put up for sale under the order of the Court in an action in the Chancery Division, and the conditions of sale provided that "if any error, misstatement, or omission shall appear to have been made in or from the above particulars or these conditions, such error, misstatement, or omission is not to annul the sale, nor entitle the purchaser to be discharged from his purchase, but compensation is to be made to or by the purchaser, as the case may be, and the amount of such compensation is to be settled by the judge at chambers." Before the purchase was completed the vendor, a mortgagor, had filed a liquidation petition, and the purchase was completed by his trustee, who executed a conveyance to the purchaser, entering into the ordinary trustee's covenants. About two years after the conveyance the vendor died, and it was then discovered that as to part of the property sold he, instead of being owner in fee, had only a life estate. The purchaser claimed compensation under the above condition of sale, and applied, in the first instance, to the Bankruptcy Court, which refused his application, and in the Court of Appeal, affirming this decision, Jessel M.R. said that it was a very hard case, but he could not see his way to assist the applicant. In his opinion the condition as to compensation did not apply to the case of a defect of title. The representation in the particulars of sale was that the estate was a freehold estate, and so it was if it was only a life estate, though he agreed that both parties understood it to mean an estate in fee simple. But taking it that the representation was that it was an estate in fee simple, still the condition as to compensation did not apply. With this judgment Baggallay and Lindley L.JJ. concurred. This appears to be a clear decision as to the non-applicability of such a condition to a defect in title: see also *In re Beyfus and Master's Contract* (1), where, however, the condition provided for errors "in the description of the property." Apart from condition, compensation cannot be recovered after conveyance in respect of defect of title: see *Clayton* v. *Leech* (2),

(1) 39 Ch. D. 110. (2) 41 Ch. D. 103.

a decision of the Court of Appeal approving *Besley* v. *Besley*. (1) There remains the question whether or not the purchaser is entitled to the alternative relief he asks, of rescission on the ground of mutual mistake. This is relief which may undoubtedly be granted in a proper case even after conveyance, although there has been nothing in the nature of fraud. In *Bingham* v. *Bingham* (2) the bargain and conveyance were nugatory: the defendant had nothing to sell or convey. This case has been repeatedly approved and acted upon: see per Lord Cranworth in *Cooper* v. *Phibbs* (3) and per Hall V.-C. in *Jones* v. *Clifford*. (4) Lord Selborne, in *Brownlie* v. *Campbell* (5), points out that where there are errors in the particulars unconnected with fraud when the conveyance takes place, it is not the principle of equity that relief should afterwards be given against that conveyance, unless there be a case of fraud, or a case of misrepresentation amounting to fraud, by which the purchaser may have been deceived; and after citing Bell's Principles as to the Law of Scotland, to the effect that where there is no warrandice the purchaser has remedy against the deficiency only on one of two grounds—either he must make out a case of misrepresentation and fraud, or he must prove an error in substantialibus sufficient to annul the whole contract—Lord Selborne continues: "It appears to me that the cases which have been decided in this country and in Ireland are to the same effect." He also refers to what was said by Lord Cottenham in *Wilde* v. *Gibson* (6) and to *Legge* v. *Croker*. (7) Assuming that there has been a common mistake on the part of vendor and purchaser in the present case, and assuming that there need not be a total failure of consideration to justify rescission after conveyance, still I do not consider that the error has been of such a nature as to justify it in the present case. I do not think the plaintiff can succeed on the ground of mutual mistake, and there are other and serious difficulties in his way. I do not see how he could, under any

(1) (1878) 9 Ch. D. 103.
(2) 1 Ves. Sen. 126.
(3) L. R. 2 H. L. 149, 164.
(4) 3 Ch. D. 779, 791–2.
(5) 5 App. Cas. 936, 937.
(6) (1848) 1 H. L. C. 605, 620.
(7) (1811) 1 Ball & B. 506; 12 R. R. 49.

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circumstances, obtain repayment of his purchase-money from the defendant trustee, who has not had it. The purchase-money has been dealt with by the order of the Court, and I think the trustee vendor must, under those circumstances, be exonerated from liability. Upon the whole case I think the plaintiff fails and the action must be dismissed.

Solicitors: *T. G. Bullen; Church, Rendell, Todd & Co.; Charles Sawbridge & Son; Alfred E. Copp.*

W. C. D.

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## *In re* CLARKE. CLARKE *v.* CLARKE.

[1899 C. 4260.]

*Will—Bequest to Committee of Corps of Commissionaires—Voluntary Association—Charity—Perpetuity.*

Bequest "to the committee for the time being of the Corps of Commissionaires in London to aid in the purchase of their barracks, or in any other way beneficial to that corps."

The corps was founded shortly after the Crimean War in order to find employment for discharged and disabled soldiers and sailors, and was entirely self-supporting. As the corps increased, buildings were from time to time acquired for the purpose of providing quarters for the men and for carrying on the business of the corps. It became necessary to employ a staff, and an endowment fund was started, being designed for the payment of officers, staff, and such other objects connected with the institution as might at the discretion of the committee require assistance. The management and property of the corps were vested in a board of governors composed of two permanent trustees, an administrative board of eighteen officers, and an executive committee of seven:—

*Held*, that, if and so far as the objects of the institution were charitable, the gift was good; and if and so far as they were not charitable, still it was a good gift, and did not tend to create a perpetuity.

*In re Dutton*, (1878) 4 Ex. D. 54; *In re Amos*, [1891] 3 Ch. 159; *In re Clark's Trust*, (1875) 1 Ch. D. 497; *Thomson* v. *Shakespear*, (1860) 1 D. F. & J. 399; and *Carne* v. *Long*, (1860) 2 D. F. & J. 75, distinguished.

*Cocks* v. *Manners*, (1871) L. R. 12 Eq. 574; *Morrow* v. *M'Conville*, (1883) 11 L. R. Ir. 236; *In re Wilkinson's Trusts*, (1887) 19 L. R. Ir. 531; and *Bradshaw* v. *Jackman*, (1887) 21 L. R. Ir. 12, discussed, and the principle laid down in those cases followed.

ADJOURNED SUMMONS.

Summons for the determination, amongst other questions, of

the question whether a gift by the testator's will to the committee for the time being of the Corps of Commissionaires was a valid bequest.

William H. S. Clarke, by his will dated August 9, 1873, gave, devised, and bequeathed, out of the share of his father's property coming to him at his mother's death, to the several persons therein mentioned the several legacies therein mentioned, amounting in the whole to 3200*l.*; and the said will proceeded: "The remainder of my share of my father's property I give, devise, and bequeath to the committee for the time being of the Corps of Commissionaires in London to aid in the purchase of their barracks, or in any other way beneficial to that corps." The share of his father's property coming to the testator at his mother's death was about 5000*l.*

The testator died in 1876, and his mother died in February, 1899, when the fund became distributable, and the question was whether the above gift was a valid bequest and passed to the governing body of the corps.

It appeared from the evidence that the corps was founded shortly after the Crimean War, in order to find employment for discharged and disabled soldiers and sailors; that it had grown from very small dimensions until at the present time between 2500 and 2600 soldiers and sailors found employment by means of its agency at good and remunerative wages. The corps was said to be entirely self-supporting so far as the men employed were concerned. All men forming the corps were required to contribute to the general funds and to the sick fund; and to encourage providence for old age each man was expected to open a savings bank account, into which he was to pay a certain amount either monthly or quarterly. Nothing, however, was charged against the men or the general funds of the corps for the officers' salaries, or for other expenses from which the men did not directly receive the benefit. Soon after the formation of the corps it became necessary to establish quarters at which the business might be carried on, and land and buildings were therefore bought for the purpose, which were subsequently paid for mainly by means of a benefaction from the late Marchioness of Westminster. Additional premises were from time to time

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acquired and paid for out of the funds of the corps. The greater part of these premises was occupied by the corps, some of the houses having been pulled down and rebuilt in the form of barracks. It was intended ultimately to utilise the whole of the sites so acquired by the erection thereon of buildings for administrative purposes and barracks for the men's accommodation. As the corps increased in numbers it became necessary to employ a staff for the conduct of its affairs; and in or about the year 1863 an officers' endowment fund was started for the purpose of providing for such and other expenses, to which legacies, subscriptions, and donations had from time to time been made, and on the terms of the following declaration: "The endowment fund of the Corps of Commissionaires is designed for the payment of the officers of staff and such other objects connected with the institution as may in the opinion of the board require assistance, provided such object is not contrary to any fundamental principle of the corps." The scheme, which was adopted in June, 1863, provided that the income of the endowment fund should be devoted by the board to the following purposes: (1.) Payment of officers of staff; (2.) offices for adjutant and staff; (3.) allowance for out-quarter divisions consisting of thirteen men and upwards, not exceeding 10*s.* per man. Any surplus to be invested to form the nucleus of a fund for building permanent barracks. It appeared that a considerable sum had been accumulated by this means, though more was needed before the complete building scheme could be carried out. It also appeared (from an affidavit on which the Court acted) that the management and property of the corps was vested in a board of governors composed of two permanent trustees, an administrative board consisting of eighteen officers, and an executive committee of seven. The duty of the executive committee was, among other things, to authorize and make investments of the fund, to authorize payments thereout and the purposes for which it was to be applied, and to appoint officers and fix their salaries. A sum of money calculated according to the number of the members of the corps was carried over every year from the endowment fund to the general funds of the corps.

*Norton, K.C.*, and *Marcy*, for the plaintiff, the legal personal representative of the testator.

*Rowden, K.C.*, and *Maugham*, for the residuary legatee. The institution is not a charity: therefore the gift is not a charitable one. Moreover, the gift is not to individuals, but is one for the benefit of the institution, which was intended to be a permanent one; therefore the gift is bad as tending to a perpetuity: *In re Dutton* (1); *In re Amos* (2); *Thomson* v. *Shakespear* (3); *Carne* v. *Long*. (4)

*Stamp*, for parties in the same interest, adopted the same argument.

[They also referred to *In re Clark's Trust* (5), *Cunnack* v. *Edwards* (6), and *Hunter* v. *Attorney-General*. (7)]

*Levett, K.C.*, and *Stewart-Smith*, for the Corps of Commissionaires. The gift is a good gift irrespective of the question whether the corps is a charitable institution or not. Under the terms of the gift there is nothing to prevent the committee realizing and dividing the fund among the whole body of Commissionaires. The society is not a permanent one; it might be dissolved at any moment. Therefore the gift is not void as tending to a perpetuity. *Cocks* v. *Manners* (8) is directly in our favour.

We submit that the corps is a charity, and therefore the gift is good; but even if it is not, then the gift is still good.

*Cave*, for a party not interested in this question, took no part in the argument.

*Rowden, K.C.*, in reply.

*Cur. adv. vult.*

May 7. BYRNE J. The question is whether or not a gift in the will of this testator is good, or void as creating, or tending to create, a perpetuity. [His Lordship read the words of the gift, and continued:—]

It is common ground that if the legacy is one to or in favour of a charity it is good. Although the original intention of

(1) 4 Ex. D. 54.
(2) [1891] 3 Ch. 159.
(3) 1 D. F. & J. 399.
(4) 2 D. F. & J. 75.
(5) 1 Ch. D. 497.
(6) [1896] 2 Ch. 679.
(7) [1899] A. C. 309.
(8) L. R. 12 Eq. 574.

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the founder, Sir Edward Walter, as stated by him in a letter printed in the rules and regulations of the corps, appears to have been to found a charity, I do not think that as subsequently and at present constituted the corps can be so considered. It is a voluntary association with a somewhat special constitution for the benefit of able-bodied and disabled soldiers and sailors alike, mainly supported by the subscriptions of the members and intended for their benefit. There are funds appropriated to the benefit of the corps which, taken separately, may be considered as charities; but I am unable to say that the corps is a charity within the legal meaning of that expression. The constitution of the corps is given in the affidavit of the adjutant as follows. [His Lordship, having stated the result of that evidence as given above, continued:—]

It is, I think, established by the authorities that a gift to a perpetual institution not charitable is not necessarily bad. The test, or one test, appears to be, will the legacy when paid be subject to any trust which will prevent the existing members of the association from spending it as they please? If not, the gift is good. So also if the gift is to be construed as a gift to or for the benefit of the individual members of the association. On the other hand, if it appears that the legacy is one which by the terms of the gift, or which by reason of the constitution of the association in whose favour it is made, tends to a perpetuity, the gift is bad. In opposition to the validity of the gift two cases were especially relied on: *In re Dutton* (1) and *In re Amos.* (2) *In re Dutton* (1) was a case of an Athenæum and Mechanics' Institution, and the gift was "unto the trustees for the time being of the Tunstall Athenæum and Mechanics' Institution, to be applied by them towards the building fund in connection therewith." One of the rules of the association was that "the institution shall not be dissolved without the consent of nine-tenths in number of the members present at a general meeting to be specially called for that purpose, such consent to be confirmed by a like majority at a further special general meeting, to be called within not less than one or more than three calendar months from the passing of such first

(1) 4 Ex. D. 54, 57, 58. (2) [1891] 3 Ch. 159.

resolution." Mr. Arthur Charles, who argued the case for some of the next of kin, in reply, referred to the Act of 17 & 18 Vict. c. 112, which by s. 30 provided that upon the dissolution of such an institution as that the members would receive no profit, but the fund would go to some other institution. Kelly C.B. was of opinion that, looking to the rules and constitution of that society, it need not come to an end, so that though the bequest did not contain the strong words of that in *Carne* v. *Long* (1), the principle of that case must apply; and Huddleston B. in giving judgment says: "We were referred to the rules of the institution, and it was said there was nothing to prevent the dissolution of the society and the division of the property, so that the case would resemble that of *Cocks* v. *Manners* (2), where there was a bequest to a voluntary association of ladies for pious and charitable purposes. This argument, however, if well founded, was met by the contention that under the Literary and Scientific Institution Act (17 & 18 Vict. c. 112), s. 30, that could not be done. That Act seems to shew that the money could not be appropriated among the members. On the whole, I am of opinion that this bequest does tend to a perpetuity and is void." That is a case where from the constitution of the legatee society it was obvious that a perpetuity was intended.

*In re Amos* (3) was a case of a gift direct to a trade union registered under the Trade Union Act, 1871. North J. in giving judgment refers to that fact and that the society was not a corporation, and says: "In my opinion the devise and bequest in remainder to the Boiler Makers' Society cannot have any effect at all. In the first place, independently of the Act, what is the meaning of it? It is, beyond question, in my opinion, a perpetuity, or a gift tending to a perpetuity. It is not intended for the benefit of the particular individuals constituting the society at the time. It was suggested in argument that the gift might have the effect of vesting the property in all the existing members as joint tenants or tenants in common. But, in my opinion, that is not the effect of the gift. Such a construction

(1) 2 D. F. & J. 75. (2) L. R. 12 Eq. 574.
(3) [1891] 3 Ch. 159.

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would be entirely contrary to the testator's intention, because, instead of the property being administered by the executive body of the Boiler Makers' Society for the purposes of the society, it would belong to a number of individuals as their common property, so that any one of them might at any moment commence an action for partition or sale, thus taking the control away from the society altogether, and simply dividing the property among themselves for their own benefit. That was not the intention of the testator. The only alternative construction is, that it is a gift to the society for the purposes of the society. Beyond all question, that is a perpetuity; *Carne* v. *Long* (1), and the observation of Hall V.-C. in *In re Clark's Trust* (2) are conclusive on the point." It is to be observed that the gift was one, too, which could not under any circumstances be divided among the members. His Lordship, as I understand, thought from the constitution of the body and from the terms of the gift that a perpetuity was intended.

Now the dictum of Hall V.-C. in *In re Clark's Trust* (2) is one of considerable authority, having been approved of in subsequent cases, including one case at least in the Court of Appeal, and it was relied upon as conclusive by North J. in *In re Amos.* (3) The gift in *In re Clark's Trust* (2) was of 500*l.*, "to be laid out and kept invested in some or one of the public stocks or funds of Great Britain in the names of such persons as shall be nominated from time to time to be trustees thereof by the friendly society called the Ringwood Friendly Society, lately held at the Red Lion Inn, but now held at the Crown Inn in Ringwood aforesaid, upon trust to apply the dividends and income thereof in aid of the funds of the said society." The learned judge says, though it was not necessary for the determination of the case: "The gift was, I think, invalid, as aiming at creating a perpetuity, in which respect it is like the case of *Carne* v. *Long.* (1) The society being dissolved, and the fund not being claimed by the trustees, who are respondents to the petition, it and any dividends in court must be

(1) 2 D. F. & J. 75. (2) 1 Ch. D. 497, 500.
(3) [1891] 3 Ch. 159.

transferred and paid to the petitioner as representative of the executor and residuary legatee of the testator." It is to be observed that the gift there was a trust, not of the capital or anything of that sort, but to apply the "dividends and income" in aid of the funds of the society; and it is obvious that the corpus could not have been disposed of having regard to the terms of the trust in that case.

There are two leading cases, namely, *Thomson* v. *Shakespear* (1) and *Carne* v. *Long* (2), to which I ought to refer. In *Thomson* v. *Shakespear* (1) there had been a trust deed whereby certain property was to be held by trustees "to the end and intent that the same premises may for ever go along and be enjoyed with and as appurtenant to Shakspeare's birthplace."

Then the settlor by his will gave 2500*l.* to his trustees and executors to be laid out by them as they should think fit, with the concurrence of the trustees of Shakspeare's house already sanctioned by him, "in forming a museum at Shakspeare's house, in Stratford, and for such other purposes as my said trustees in their discretion shall think fit and desirable for the purpose of giving effect to my wishes. I direct, moreover, that, out of the rents of the Langley Priory estate, the sum of 30*l.* half-yearly, namely, on the 24th day of June and on the 24th day of December of each year following my decease be applied to the wages of a keeper or guardian." The Lord Chancellor in giving judgment in that case (3) finds an intention expressed on the face of the will that the museum "should exist in sæcula sæculorum," and he says: "When you come to look at that part in which he charges the estate with 60*l.* a year for a custodian, it is quite clear that was to be perpetual; and if you look to the intention of the testator, to be gathered from the will, then his intention was that this should be laid out upon a building that was to stand and be perpetual in memory of Shakspeare."

In the case of *Carne* v. *Long* (2) the words were very strong for shewing the intention to create a perpetuity. That was

(1) 1 D. F. & J. 399. (2) 2 D. F. & J. 75.
(3) 1 D. F. & J. 407.

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the case of a public library at Penzance, and rule 29 of the rules governing the institution provided that—"The institution shall not be broken up as long as ten members remain; but whenever the number shall be reduced below ten, all donations shall be returned to the donors, or their representatives, who may claim the same; and the remaining books and other articles shall be forthwith sold by public auction, and the proceeds appropriated to the foundation or support of some scientific institution in the town of Penzance, to be determined by a majority of the remaining members." And the Lord Chancellor in the course of his judgment says (1): "If the devise had been in favour of the existing members of the society, and they had been at liberty to dispose of the property as they might think fit, then it might, I think, have been a lawful disposition and not tending to a perpetuity." It appears to me that these authorities are clearly distinguishable from the present case.

In support of the validity of the gift, the case, which has been frequently recognised as good law, is that of *Cocks* v. *Manners* (2), before Wickens V.-C., where there was a gift in the following words: "The residue of my disposable property I leave equally between the following religious institutions," one of those institutions being "the Dominican Convent at Carisbrook (payable to the superior for the time being)." It was found that that institution was one consisting of Roman Catholic females living together by mutual agreement in a state of celibacy under a common superior, and it was held that it was not a charity. The Vice-Chancellor in giving judgment says (3): "The gift to the Dominican Convent is not, in my opinion, a gift on a charitable trust. The question remains whether the gift to the Dominican Convent, which seems to me not charitable, is void for perpetuity. It is argued that it is a gift in trust for the purposes of a perpetual institution, and, therefore, on a perpetual trust, and *Carne* v. *Long* (4) is relied upon. That case does not, I conceive, decide that a gift to a perpetual institution not charitable is bad—for instance, a gift

(1) 2 D. F. & J. 79.
(2) L. R. 12 Eq. 574.
(3) L. R. 12 Eq. 585.
(4) 2 D. F. & J. 75.

to a club, or a limited company; but merely that the gift in question there was a gift which the trustees could only give effect to by holding the property (which seems to have been all real estate) for ever, and applying the income according to the rules. Nothing of that sort is directed here; the gift is ordered to be paid to the superior for the time being; and the superior, when she receives it, will be bound to account for it to the convent—to put it, so to speak, into the common chest; but when there it will be subject to no trust which will prevent the existing members of the convent from spending it as they please. It would, I conceive, be an extreme stretch of the rule against perpetuity to hold that it applies to a gift of this sort." And the Vice-Chancellor held that the gift was good.

There are three Irish cases I ought to mention. The first of these is *Morrow* v. *M'Conville* (1), and the passage I wish to refer to is at p. 249 of the report. The learned judge refers to the case of *Cocks* v. *Manners* (2), and distinguishes it from the case before him; and then he says: "Here the testator, in the first place, gives all his property to his wife for life, determinable on her marrying again. After her death he directs his executors to let his property, by which in this place he plainly means the property known as Murray's Place in Lurgan, and to apply the profit rent to the three purposes the first of which I am now considering. This, in my opinion, indicates an intention that this property, which consisted of houses built on ground held by him for the residue of a term of 999 years, should be retained in specie. The trust is treated as a continuing one, to be performed by his executors in the first instance, but with power to appoint successors, not in the executorship, which could not be, but in the trusteeship, from time to time, during the term of his lease, shewing that he desired the trust to continue during that period." That case is clearly distinguishable from *Cocks* v. *Manners*. (2)

The next is *In re Wilkinson's Trusts*. (3) There there was a bequest of 1000*l*. to S. A., superioress of the Convent of Mercy at K., "to and for the purposes solely of the said convent, or to such other person as may be superioress of said convent at my" (the testator's) "decease." It was held by the Court

(1) 11 L. R. Ir. 236. (2) L. R. 12 Eq. 574. (3) 19 L. R. Ir. 531.

BYRNE J. 1901 CLARKE. *In re.* CLARKE *v.* CLARKE.

of Appeal that, whether it was good or not as a charitable gift, it was valid as a bequest to the person who should be superioress of the convent at the testator's death, "and that it was not the less so by reason of the direction to apply it solely for the purposes of the convent." Lord Ashbourne L.C. refers to a number of authorities, especially *Cocks* v. *Manners* (1), and *In re Delany's Estate* (2), and he holds, on a similar ground to that mentioned by Wickens V.-C. in *Cocks* v. *Manners* (1), that the gift was a good gift because it was a gift to this person for the benefit of the convent, and that there was nothing to prevent the disposition of the property. The Lords Justices agree with him upon that, and they fully establish *Cocks* v. *Manners* (1) as a good authority.

The last case I refer to is that of *Bradshaw* v. *Jackman* (3), where there were three or four bequests: (1.) a bequest to M., superioress of the St. Anne's Convent of Mercy, in trust for the community of the said convent; (2.) bequest of bank stock to J., provincial of the Franciscan missionaries of Merchant's Quay, in the city of Dublin, or to the provincial of the said missionaries at the time of the testatrix's death, for the offering of masses for the repose of the soul of the testatrix; (3.) bequest of 100*l.* to the Marist sisters of the convent of C.; and (4.) bequest of the residue of real and personal estate to G., superioress of the convent of D., in trust for the support and maintenance of the said D. Convent. It was held that the legacy No. 2 to the provincial of the Franciscan missionaries was a gift to him individually for the offering of masses, and as such was valid. It was held that the community of a convent means the persons at the time members of the convent, and that the legacies Nos. 1, 3, and 4 were valid bequests to the respective legatees as individuals, and therefore did not transgress the rule against perpetuities. There is a long judgment of the Master of the Rolls in that case, in which again he deals with *Cocks* v. *Manners* (1) and with *Carne* v. *Long* (4), and cites again from the decision of Wickens V.-C.

Now, it seems to me that what I have to do is this. First of all, I look at the constitution of this association,

(1) L. R. 12 Eq. 574.
(2) (1882) 9 L. R. Ir. 226.
(3) 21 L. R. Ir. 12.
(4) 2 D. F. & J. 75.

and, apart from the funds which, as I have said, may be construed as charities, I do find upon the face of the rules and regulations an intention that it shall be permanent—that is to say, there are expressions used with reference to rendering it permanent, and shewing that the founder or the framer of the rules hoped that it would be permanent. Precisely the same thing occurs, although it may not be put down in words, in the rules of a club. When a club is established it is intended to continue for a long series of years—to be permanent, in the fullest sense of the word; so it does not appear to me that that is a sufficient reason for holding that a gift to an institution of that kind is one void for perpetuity. The form of the gift here is "to the committee for the time being of the Corps of Commissionaires, to aid in the purchase of their barracks." Now, it is true enough that "to aid in the purchase of their barracks" rather points to something that is to last for a considerable time. I do not think I need go into the question of whether the fund for the creation of the barracks is, in fact, itself a charitable fund or not. I think there is considerable room for argument; but it does seem to me that all the members of a society constituted as this one is could, if they so pleased, and unless the building of the barracks be a charity, deal with the funds intended for building or with the buildings just as they please. If it is a charity they could not deal with them as they please, but then the gift is perfectly good. If it is not a charity they could deal with them as they please, because there is nothing to prevent all the members of the association joining together to dispose of the funds or of the barracks.

Then the gift goes on—"or in any other way beneficial to that corps." That gives a discretion to the committee for the time being when they get the money, as I read it, to apply the fund as they shall consider to be beneficial. They may put it into the building fund or into the general funds of the corps, or they may deal with it in any way they please for the benefit of the corps. When once it forms part of the funds of the corps, it may be dealt with by the governing body of the corps in any way they may think best for the benefit of the corps.

It appears to me that the result is this: if and so far as any

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of the objects of this gift may be considered to be charitable, the gift is good on that ground. If and so far as the objects are not charitable the gift is good, because, within the meaning of the authorities I have referred to, it does not tend to a perpetuity. I hold, therefore, that the gift is good.

Solicitors: *H. J. North; Tyrrell Lewis, Lewis & Broadbent; Soames, Edwards & Jones; Spencer Chapman & Co., for Kinneir & Co., Swindon.*

G. M.

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COZENS-HARDY J.
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*March* 21.

## PEARCE *v.* BASTABLE'S TRUSTEE IN BANKRUPTCY.

[1900 P. 2593.]

*Vendor and Purchaser—Specific Performance against Vendor's Trustee in Bankruptcy—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 55—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 13.

Specific performance may be enforced against the trustee in bankruptcy of a vendor of property, and, if the property is leasehold, he cannot disclaim the contract without disclaiming the lease.

*Holloway* v. *York*, (1877) 25 W. R. 627, distinguished.

By an agreement dated June 19, 1900, between F. Bastable and E. E. Pearce, Bastable agreed to sell and Pearce agreed to purchase for 85*l.* a leasehold house at Richmond subject to a mortgage on which there was then due 300*l.*, Bastable agreeing to pay any interest due on the mortgage up to the date fixed for completion. The agreement also provided that Pearce should on execution of the agreement pay Bastable 42*l.* 10*s.* as a deposit and in part payment of the purchase-money, and should pay the balance of purchase-money on July 16, 1900, when the purchase should be completed, and from which date Pearce, on payment of the balance of purchase-money and all interest and other moneys (if any) payable under the agreement, should be entitled to possession of the property, all outgoings payable to the landlord together with any interest due upon the mortgage being cleared by Bastable up to July 16, 1900; and that such rents and outgoings should, if necessary, be apportioned between the parties, and that the balance upon such apportionment should be deducted from or paid with the balance of the purchase-money as the case might be.

Pearce paid the deposit on the execution of the agreement, and accepted the vendor's title to the property.

On August 21, 1900, Bastable was adjudicated a bankrupt, and on August 24 A. C. Bourner was appointed trustee in the bankruptcy. Bourner approved the draft of the assignment to Pearce, and the assignment was engrossed and forwarded for execution; but the trustee refused to execute the assignment unless the full amount of the balance was paid, without any deduction, whereas he had allowed the interest on the mortgage to fall into arrear.

On November 19, 1900, Pearce commenced an action against the trustee claiming (1.) a declaration that the defendant was not entitled to disclaim the agreement; (2.) specific performance of the agreement; (3.) an account of the moneys payable by the plaintiff on completion; (4.) on payment of such moneys an order to convey the property to the plaintiff; (5.) damages; (6.) costs.

The statement of claim was delivered on December 6, 1900, and on December 22 the defendant by a written document purported to disclaim the agreement.

The plaintiff thereupon amended his statement of claim, and claimed in addition that the so-called disclaimer was invalid, and, in the alternative, that if it was good the plaintiff was entitled to a lien for his deposit, the damages sustained, and the costs of the action.

The action came on for trial on March 21, 1901.

*Lord Coleridge, K.C.*, and *W. M. Spence*, for the plaintiff. On Bastable being adjudicated a bankrupt, the legal estate in the property sold vested in his trustee in bankruptcy, subject to the plaintiff's equitable right to a conveyance from him on payment of the balance of the purchase-money: *Ex parte Rabbidge*. (1)

The trustee could not legally disclaim the contract without disclaiming the lease: *Re Kerkham*. (2)

[They also referred to Fry on Specific Performance, 3rd ed. pp. 439, 627.]

(1) (1878) 8 Ch. D. 367. (2) (1886) 80 L. T. Jour. 322.

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PEARCE v. BASTABLE'S TRUSTEE IN BANKRUPTCY.

*Eve, K.C.*, and *Edward Clayton*, for the defendant. Independently of the disclaimer, specific performance of a contract by a person who is afterwards adjudicated a bankrupt cannot be obtained against his trustee in bankruptcy: *Holloway* v. *York* (1); Fry on Specific Performance, 3rd ed. p. 439.

The trustee has power under s. 55 of the Bankruptcy Act, 1883, as amended by s. 13 of the Bankruptcy Act, 1890, to disclaim a contract entered into by the bankrupt, and it is for the trustee to decide whether he will adopt the contract or disclaim it. The leave of the Court is not required in the case of a contract, and if the purchaser has suffered damage he may prove in the bankruptcy.

COZENS-HARDY J. The case is plain. There was a contract, which is in no way impeached, for the sale to the plaintiff of the equity of redemption in certain leasehold property. On this contract a deposit was paid by the purchaser, and the title was accepted by him. Then the vendor became bankrupt, and a delay ensued, which was possibly occasioned by the bankruptcy proceedings. The draft assignment was sent in by the purchaser and approved, and the engrossment was forwarded. There is no dispute about the form of the assignment—it was of the leasehold property subject to the mortgage. The trustee in the vendor's bankruptcy has, to use plain language, the impudence to say that he will disclaim the contract without disclaiming the lease, keep the deposit paid by the purchaser, and leave him to take such steps in the bankruptcy as he may think fit to take. That the trustee cannot be allowed to disclaim the contract without disclaiming the lease was plainly shewn by the decision of Cave J. in *Re Kerkham*. (2) There, before bankruptcy, a man contracted to sell leasehold property to another who sold his rights under the contract to a third person. The trustee in the bankruptcy of the original vendor purported to disclaim the contract without disclaiming the lease, and the Court held that it was not competent for him to separate the subject-matter of the contract from the contract and keep the property, and that the disclaimer was

(1) 25 W. R. 627. (2) 80 L. T. Jour. 322.

void. That is precisely this case. The disclaimer which the trustee has purported to make is a nullity. What is the position of the trustee in such a case? It has been contended on his behalf that the fact of the bankruptcy makes all the difference as regards the liability to specifically perform a contract. In support of that, *Holloway* v. *York* (1) has been referred to. The effect of that decision is correctly stated in Dart's Vendors and Purchasers, 6th ed. p. 1126—that is to say, that specific performance cannot be decreed against the trustee in bankruptcy of the purchaser. That decision has no application to a case in which the vendor's trustee in bankruptcy is the defendant. If any authority is needed in support of this finding it is to be found in *Ex parte Rabbidge* (2), where James L.J. said: "The result was that, upon the adjudication being made, the legal estate in the property vested in the trustee in the bankruptcy, subject to the equity of the purchaser under the contract. That equity gave him a right to have the property conveyed to him, upon payment of the purchase-money to the person to whom the property belonged." And Cotton L.J. said: "The trustee in the bankruptcy . . . . had vested in him the estate of the bankrupt in the property. He was not in the fullest sense of the word a trustee of the property for the purchaser, because the whole of the purchase-money had not been paid. But he took the legal estate in the property, subject to the equity of the purchaser under the contract, which gave the purchaser the right to say, Convey me the estate on my paying the purchase-money." Anything more explicit on this part of the case could not well be imagined. All that the plaintiff asks the trustee to do is to execute the engrossment already approved and assign the property to him, and, the plaintiff disclaiming any right of proof against the bankrupt's estate, an order for such execution, and that the defendant is to pay the costs of the action, must be made.

Solicitors for plaintiff: *Seeley & Son.*
Solicitors for defendant: *Ward, Perks & McKay.*

(1) 25 W. R. 627.
(2) 8 Ch. D. 367, 370.

F. E.

COZENS-HARDY J.

1901

March 26.

## HEDLEY *v.* WEBB.

[1901 H. 437.]

*Local Government—"Sewer"—"Drain"—"Building"—Semi-detached Houses—Effect of laying Sewer in another Person's Land—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 13.

The plaintiff and the defendant were the owners respectively of two plots of land adjoining a road in which there was a public sewer vested in the local authority. Each of them was also the owner of one-half of the road so far as it ran with his plot.

The defendant first acquired his plot, and built thereon a pair of semi-detached houses. The drains from each of the houses joined at a point on the defendant's land, and from that point the sewage was carried by one culvert into the public sewer. Part of the culvert was carried through the portion of the road which then belonged to the plaintiff's predecessor in title, and was constructed under circumstances which made its construction a trespass. The plaintiff, having purchased his plot and the adjoining half of the road, required the defendant to remove the portion of the culvert which lay under the latter:—

*Held*, (1.) that the defendant's pair of semi-detached houses constituted "one building only" within the meaning of s. 4 of the Public Health Act, 1875, and that the culvert, from the point of junction of the drainage of the two houses, was a "drain" and not a "sewer" within the meaning of that section; (2.) that even if the culvert was a sewer the defendant could not by his wrongful act vest in the local authority the part of it which lay in the plaintiff's land, and that the plaintiff was entitled to have that part removed.

From December 31, 1898, until January 17, 1901, R. G. Marchant was the owner in fee simple and in possession of two plots of land, being plots 113 and 114 of the Longland Park estate, Sidcup, and of one-half of Park Hill Road so far as the two plots fronted on that road.

From about November, 1899, S. Webb was the owner in fee simple of plot 112 of the same estate (adjoining plot 113), and of one-half of Park Hill Road so far as his plot fronted on that road. On this plot Webb built two semi-detached houses, and in the same month he laid down two sets of pipes from the water-closets of his two houses, which pipes ultimately joined and ran into one common conduit, which was connected with

the sewer (vested in the local authority) in Park Hill Road. This connection with the sewer was made under that part of the road which was in front of plot 113 and belonged to Marchant, and it was made without the consent or acquiescence of Marchant.

On January 17, 1900, Marchant conveyed plots 113 and 114 to J. Hedley. Hedley requested Webb to remove the pipes and connection so far as they were in the part of the road opposite to plot 113, and, on his refusal to do so, brought an action against him claiming as follows: "(1.) A declaration that the defendant is not entitled to drain his said premises through the plaintiff's said adjoining premises; (2.) an injunction to restrain the defendant from permitting the said drains and pipes, so far as the same are in or under the plaintiff's said premises, to be used as such or to remain in or under the same, and an order that the defendant do take up and remove such drains and pipes, or, alternatively, (3.) a declaration that such drains and pipes, so far as aforesaid, are the property of the plaintiff, and that he is entitled to remove the same; (4.) damages in addition to or (alternatively) in lieu of an injunction; (5.) costs."

*Micklem*, *K.C.*, and *Edward Clayton*, for the plaintiff. The first question is whether the connection with the sewer between the sewer and the point of connection between the two drains from the defendant's two houses is a drain or a sewer. The defendant says it is a sewer. The plaintiff says it is a drain. Sect. 4 of the Public Health Act, 1875, defines a "drain" as meaning "any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed." The definition of "sewer" in the same section excepts drains to which the interpretation of "drain" applies, and therefore the connection if a drain cannot also be a sewer. The definition of drain refers to a "building"—not a house, and each block of two semi-

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detached houses is only one building. To make the receptacle a sewer it must receive the drainage of more than one building: *Acton Local Board* v. *Batten* (1); *Travis* v. *Uttley*. (2)

[COZENS-HARDY J. referred to *Bradford* v. *Eastbourne Corporation*. (3)]

In the case we have cited and in *St. Martin-in-the-Fields Vestry* v. *Bird* (4) more than one building drained into a common receptacle. A number of separately occupied sets of apartments under one roof with branch drains running into a main drain communicating with the sewer would be only one building: *Pilbrow* v. *St. Leonard's (Shoreditch) Vestry*. (5) In *Kershaw* v. *Taylor* (6) the common receptacle of two buildings was held to be a sewer, but there were two sets of semi-detached houses in that case.

The defendant will contend that being a sewer the conduit is vested in and under the control of the local authority in pursuance of s. 13 of the Public Health Act, 1875; but one man cannot, by a trespass on another man's land, which is a wrongful act, cause part of that land to vest in the local authority. To become a sewer it must have been lawfully made: *Bateman* v. *Poplar District Board of Works* (7); *Meader* v. *West Cowes Local Board*. (8)

[COZENS-HARDY J. In *Kershaw* v. *Taylor* (6) the common receptacle was held to be a sewer although it had been wrongfully made.]

It was not the interest of the respondent Taylor to contend that the receptacle was a drain, and it was held that, having taken without notice, he was not estopped by the wrongful act of his predecessor from contending that the receptacle was not a drain. The soil of the road in the part where the defendant has trespassed being vested in the plaintiff, he is entitled to an injunction to restrain the continuance of the conduit there: *Goodson* v. *Richardson*. (9)

(1) (1884) 28 Ch. D. 283.
(2) [1894] 1 Q. B. 233.
(3) [1896] 2 Q. B. 205, 218.
(4) [1895] 1 Q. B. 428.
(5) [1895] 1 Q. B. 433, 438.
(6) [1895] 2 Q. B. 208, 471.
(7) (1887) 37 Ch. D. 272.
(8) [1892] 3 Ch. 18.
(9) (1874) L. R. 9 Ch. 221.

[They also referred to *Kinson Pottery Co.* v. *Poole Corporation* (1); *Mayfair Property Co.* v. *Johnston.* (2)]

*Eve, K.C.*, and *Buckmaster*, for the defendant. Marchant, the plaintiff's predecessor in title, acquiesced in the making of the connection through his land to the sewer, and therefore there was no trespass, and a sewer had been lawfully created before the plaintiff came on the scene. The conduit, as it is the common receptacle of two houses, or two sets of premises not within the same curtilage, is a "sewer" and not a drain: *Acton Local Board* v. *Batten* (3); *Travis* v. *Uttley.* (4) Under s. 13 of the Act of 1875 the conduit, as a sewer, is vested in the local authority, and the plaintiff, therefore, has no right to interfere. *Kershaw* v. *Taylor* (5) shews that illegality in connecting drains does not necessarily prevent a thing from becoming a sewer.

[They also referred to *Beckenham Urban Council* v. *Wood.* (6)]

COZENS-HARDY J. The defendant in the present action, Mr. Webb, bought plot 112, and he was minded to erect a pair of semi-detached houses on that plot. He sent plans to the local authority. The first plan was as to the drainage, and the other plan was as to the building, and the building has been erected substantially, although not exactly, in accordance with that plan.

The drains from this pair of houses go round to the back thereof to the water-closets of the two houses respectively. There are two man-holes at the back, and there is another man-hole just at the corner of the plot at the side of Park Hill Road.

The defendant Webb has carried a drain, or at any rate made a connection, between that man-hole and the public sewer in Park Hill Road, and he has carried that connection across the frontage or front part of the adjoining land, which frontage was the property of a Mr. Marchant and is now the property of the plaintiff in this action.

(1) [1899] 2 Q. B. 41.
(2) [1894] 1 Ch. 508.
(3) 28 Ch. D. 283.
(4) [1894] 1 Q. B. 233.
(5) [1895] 2 Q. B. 208, 471.
(6) (1896) 60 J. P. 490.

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The plaintiff Hedley complains that a drain has been laid through his land from the man-hole to the public sewer, and asks for a declaration and an injunction.

Primâ facie, what the defendant Webb has done is a trespass, but it is sought to be justified in several ways. It is said, first of all, that Marchant acquiesced in what was done, but of that there is absolutely no evidence. It is then said that the drain (or culvert as it has been called) from this pair of semi-detached houses to the man-hole is not really a "drain," but is a "sewer" within the meaning of the Public Health Act, 1875, and is vested in the local authority.

In order to consider whether this connection is a sewer within the meaning of the Public Health Act, it is of course necessary to look at the definition clause, s. 4, of the Act. First of all I take the definition of "sewer." "'Sewer' includes sewers and drains of every description, except drains to which the word 'drain' interpreted as aforesaid applies, and except drains vested in or under the control of any authority having the management of roads and not being a local authority under this Act." Turning back to the definition of "drain," "'drain' means any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed."

Apart from authority, I should have thought that, as regards the drainage of one building only, it was a question of fact to be considered in each case, "Aye or no, is this one building?" And it may be one building, though occupied by a great number of people, whether in flats or not. The words used are not "one house only," but "one building only." I think the authorities substantially bear out this view. Indeed, the view that two semi-detached houses may be—I do not say must be—one building only is borne out by what was said by the Divisional Court and by the Court of Appeal in *Kershaw* v. *Taylor*. (1) That was a very curious case. There were two

(1) [1895] 2 Q. B. 208, 471.

pairs of semi-detached houses. The drains of the two pairs of houses were connected, and from the point of junction the drainage was carried through a culvert which ran entirely through the premises of one of the four houses into the sewer. Therefore the drains of each of the two buildings (each constituting a semi-detached pair) were carried to a point where they were joined together, and from that point of junction the sewage went through one common culvert down to the sewer. The respondent, who was the owner of one of the houses, discovered, in opening up the drain from his house to the point of junction, and not until that point was arrived at, that the predecessor in title of the four houses, contrary to the requirements of the local board, had joined the drainage, not only of the other house in the pair of houses to which the respondent's house belonged, but of the other pair of semi-detached houses; and the Court used language which seems plainly to me to mean, "It is a drain down to the point of junction, and it is a sewer from below that point. It is a drain above that point because it applies to one building, and it is one building only though it is a pair of semi-detached houses."

I do not see that there is any authority that binds me to decide to the contrary. In *Travis* v. *Uttley* (1) there were three houses in a row, and Wills and Wright JJ. held as a matter of fact that the houses were not one building only, and that what received the drainage of each of the houses before it entered the public sewer was a sewer and not a drain.

But in this case I hold that there is one building only on plot 112, and none the less because it is used as a pair of semi-detached houses. It follows that the culvert is not a sewer so far as it goes over Webb's own land. But even if it were a sewer, a further difficulty would arise as to which, as at present advised, I am against the defendant. Can a man, in making a sewer or continuing a sewer, carry it through a neighbour's land wrongfully, and, without the consent of that owner, make it a sewer so as to vest the property in the local authority, and so constitute it a public sewer within the meaning of the Public

(1) [1894] 1 Q. B. 233.

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Health Act? On that point I think that the judgments of Chitty J. and of the Court of Appeal in *Meader* v. *West Cowes Local Board* (1), which is an authority which binds me, are in the plaintiff's favour. In that case there were several houses which were drained into a cesspool, and from the cesspool a culvert was made through land forming part of the foreshore of a river without the consent of the owner of the foreshore, who subsequently stopped it up, and Chitty J. in his judgment said (2), after calling the pipes which constituted the culvert a "sewer": "After the pipes had reached the pit they were continued on by the plaintiff, who constructed the work entirely on his own land until he came to the land of Mr. Atkey, and there, without any title, he carried on his pipes until the sewage, brought down along the course of them, emptied itself into a place called the Deep Water Sink, which was at the mouth of the river Medina where the tide flowed. Latterly, Mr. Atkey, acting entirely within his rights, has stopped up the pipes, so that the sewage no longer flows into the river." And Lord Coleridge C.J. in dealing with the case says (3): "In determining that question"—whether there was or was not a sewer—"it seems to me that we must entirely reject from the consideration of the case so much of the sewer (if we may so call it) as was carried through land which did not belong to the plaintiff, and which he had no licence from the owner to use, so that the carrying the pipes through it was an act of trespass so clear that Mr. Levett, who certainly took every conceivable point in favour of his client, did not and could not deny that Mr. Atkey, in stopping the outlet, was acting clearly within his right. In my judgment so much of the sewer (so to call it) as was put without any sanction or licence on the land of another person, and which that other person had a right at any moment to stop, cannot be part of a sewer within the meaning of the Act of Parliament, and cannot have been intended by the Legislature to vest in the local board." And Lopes L.J. puts the point shortly. He says (4): "What was done between those two points was an unjustifiable trespass on the part of

(1) [1892] 3 Ch. 18.
(2) Ibid. 20.
(3) [1892] 3 Ch. 26.
(4) Ibid. 30.

the plaintiff, and I think that to shew what the effect of it is it is sufficient to ask this question—Can it be said that a right in alieno solo can be conferred on a local authority by the wrongful act of a third party?"

Even if it appeared, contrary to my view, that this drain was a sewer down to the boundary of Webb's own land, I do not think that he could, by a wrongful act, by a trespass on the land of some one else, make that portion of the drain which runs through that other person's land a sewer within the meaning of the Act.

Unless there is something other than the Public Health Act, which entitles the defendant Webb to connect his drain with the public sewer, although by so doing he may have to go through his neighbour's land, there is, in my judgment, no answer to this action.

[His Lordship then discussed the question of acquiescence and a point on the construction of the conveyances, both of which he decided in the plaintiff's favour, and made a declaration in the terms of paragraphs 1 and 3 of the claim, and ordered the removal of the pipes from the plaintiff's land.]

Solicitor for plaintiff: *John Bartlett.*
Solicitor for defendant: *Shirley W. Woolmer.*

F. E.

COZENS-HARDY J.

1901

*April* 25.

## *In re* TAYLOR. SMART *v.* TAYLOR.

[1901 T. 379.]

*Will—Contingent Interest—Accumulation.*

The proceeds of a trust for sale and conversion were given by will to such of the children of a married woman as should attain twenty-one, or being daughters attain that age or marry, with a gift over. There was, in the events which had happened, no express disposition of the income. The married woman was forty-six years old and childless. The Court directed the income to be accumulated for twenty-one years from the testator's death or until the gift over took effect.

*Green* v. *Tribe*, (1878) 47 L. J. (Ch.) 783; 27 W. R. 39, not followed.

THIS was a summons taken out by the trustees and executors of the will of William Harcourt Taylor, who died in April, 1900.

The testator devised and bequeathed all his real and personal estate not otherwise disposed of to his trustees upon trust for sale and conversion, and out of the moneys to arise therefrom and his ready money on trust to pay funeral and testamentary expenses, debts, and legacies, and invest the residue, which residuary moneys and the investments representing the same were therein referred to as the residuary trust funds. And in the event (which happened) of his not leaving any child, he directed his trustees to pay certain further legacies, to appropriate and invest a sum of 5000*l.* and pay the income to his wife Elizabeth Taylor, the first defendant to the summons, for life, to appropriate and invest 2000*l.* and pay the income to his sister, Mary Ann Smart, for life. And upon the death of Elizabeth Taylor and Mary Ann Smart, the testator authorized his trustees to transfer to or divide between his residuary legatees the appropriated funds. He directed his trustees to stand possessed of the residuary trust funds, and also of the appropriated funds, subject as aforesaid, in trust for all the children of Mary Ann Smart who being sons should attain the age of twenty-one years, or being daughters should attain that age or marry, in equal shares. And in the event of

Mary Ann Smart not leaving any child or children who should attain a vested interest in the remainder of the residuary trust funds, he directed the trustees to hold the same funds for other persons.

Mary Ann Smart was the wife of Joseph Smart, one of the trustees and plaintiffs in the summons; she was forty-six years old; she had never had a child.

The object of the summons was to determine whether the income of the residue ought to be accumulated during the period which might elapse before Mary Ann Smart died, or had a child, or until twenty-one years after the death of the testator, for the benefit of those persons who might ultimately become entitled, or whether there was an intestacy as to the income for any and what period.

*Lambert*, for the trustees.

*W. C. Druce*, for next of kin and the heir of the testator. No accumulation will be directed till there is some particular person in existence for whose benefit the accumulation will take place; it would be for the benefit of after-born children that the accumulation, which can only be allowed for twenty-one years, should begin at the later period; in the meantime there is an intestacy as to the income: so far as it arises from the testator's realty it goes to the heir, so far as from personalty to the next of kin of the testator: *Green* v. *Tribe* (1); *In re Townsend's Estate.* (2) [He also referred to *Genery* v. *Fitzgerald* (3); *In re Dumble* (4); *Countess of Bective* v. *Hodgson.* (5)]

*Gatey*, for Mrs. Smart, contra, was not called on.

COZENS-HARDY J. I think that in this case there must be an accumulation for twenty-one years, or until the event that there can be no child who can take a vested interest happens. I am bound to say that I do not understand the principle upon which Fry J. in *Green* v. *Tribe* (1) held there was an intestacy as to the income. I need not say that I should follow with the greatest respect a clear decision of that learned judge on a

(1) 47 L. J. (Ch.) 783; 27 W. R. 39.
(2) (1886) 34 Ch. D. 357.
(3) (1822) Jac. 468; 23 R. R. 121.
(4) (1883) 23 Ch. D. 360.
(5) (1864) 10 H. L. C. 656.

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question of principle; but I do not follow the legal process by which he arrived at the conclusion. Since the case of *Countess of Bective* v. *Hodgson* (1)—I think long before—it has been settled law that a gift of residuary personal property on a future contingency carries with it the intermediate income: the same rule applies to a mixed fund. But that rule is modified by the Thellusson Act. That modification was worked out most carefully by the House of Lords. All I can do now is to declare that the income should be accumulated for the benefit of those who may be ultimately entitled for twenty-one years, or until the death of Mrs. Smart without a child.

Solicitors: *Huntington & Leaf, for Clay & Atkins, Nuneaton.*

D. P.

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*March* 2, 16; *April* 27.

## HARRISON *v.* HARRISON.

[1872 H. 211.]

*Will—Construction—"Survivor."*

A testator bequeathed shares of personal estate on trust for his three sons for their respective lives and their children and remoter issue born in their respective lifetimes. He directed that, in case any of his sons should have no issue who should attain a vested interest in the share of their father, that share should be held in trust for the testator's surviving sons and their issue in the like manner as their original shares. Two sons died leaving issue who attained vested interests. The third son survived them, and died without having had a child:—

*Held*, that there was an intestacy as to his share.

The third rule in *In re Bowman*, (1889) 41 Ch. D. 525, dissented from.

THIS was a petition by the now sole trustee of the will and seven codicils of Benson Harrison, the testator in this cause, who died in November, 1863. The object of the petition was to obtain the judgment of the Court as to who, upon the proper construction of the will and codicils, became entitled on the recent death of Benson Harrison, a son of the testator, to a share of personal estate in which Benson Harrison was entitled to a life interest.

(1) 10 H. L. C. 656.

The testator had three sons, Matthew Benson Harrison, Wordsworth Harrison, and Benson Harrison, and two daughters, Mrs. Dobson and Mrs. Bollard, who all survived him.

The testator bequeathed his eight and a half sixteenth shares in the businesses of Harrison, Ainslie & Co. from the 1st day of January, 1864, upon trust to carry on the business in conjunction with the other partners, and stand possessed of three and a half of the shares upon trust, subject to the deduction of a sum of 250*l.* a year during the life of his son Matthew Benson Harrison, to pay the whole or any part of the income and accumulations of income to Matthew Benson Harrison during his life at their discretion, and after his decease to hold the three and a half shares and accumulations of proceeds on the trusts declared for the children and remoter issue of the testator's son Matthew Benson Harrison (such issue to be born in his lifetime).

The testator by his will settled in the same way three shares (altered by codicil to two shares) in the businesses on his son Wordsworth Harrison, and the other two shares (altered by codicil to three shares) on his son Benson Harrison.

After these gifts the will proceeded: "And in case any of them the said Matthew Benson Harrison, Wordsworth Harrison, and Benson Harrison respectively shall die, and no child or other issue of such of them so dying shall acquire a vested interest in the shares hereby settled upon them respectively under the trusts or powers aforesaid, I direct that the respective shares of such of my said sons as shall so die, or so much thereof as shall not have been applied under the powers herein contained, and the annual income thereof, shall be held for the benefit of the survivors or survivor of them my said sons and their or his respective issue, in equal shares upon such and the like trusts, and to and for such and the like interests and purposes, and with, under, and subject to such and the like powers, provisos, and declarations as are herein declared with respect to their respective original share or shares."

The testator by his will also settled pecuniary legacies and

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one-third of his residue (altered by codicil to one-third of his ultimate residue) upon each of his three sons and their issue by reference to the settlements of the shares of his business, with gifts over in the case of the death of each son without issue who should take a vested interest in favour of the survivors or survivor and their issue. The legacy in favour of Benson Harrison and his issue was in the following terms: "And as to the sum of 26,000*l.*, the remaining part of the said sum of 66,000*l.*, and also as to one other third part of the ultimate residue of my said personal estate, I direct my said trustees or trustee for the time being to stand possessed thereof for the like interests and purposes and with the like powers in favour or for the benefit of my said son Benson Harrison and his children and other issue (such issue to be born in his lifetime), and with the like discretionary powers as to the payment of the interest or other annual produce thereof to my said son Benson Harrison during his life as are hereinbefore declared with respect to the shares in my said partnership businesses hereby settled upon him and them; and in case no child or other issue of my said son Benson Harrison shall acquire a vested interest in the said sum of 26,000*l.* and his said share in my residuary personal estate under the trusts or powers hereinbefore contained or referred to, I direct that the same or so much thereof as shall not be applied under the said powers and the annual income thereof shall be held in trust for my surviving sons in equal proportions, upon the like trusts and for the like intents and purposes, with the like powers, in favour of my said sons and their children or other issue, and with the like discretionary powers as to the payment of the interest or other annual produce thereof to them during their respective lives as hereinbefore declared with respect to their respective original shares in the said sum of 66,000*l.* and in the residue of my said personal estate." There was no gift over in case all the sons died and had no issue who attained vested interests.

The testator's sons Matthew Benson Harrison and Wordsworth Harrison both died in the lifetime of their brother Benson Harrison, and left issue who took vested interests in

their settled shares of the businesses and residue. Benson Harrison, the son, never had a child: he was now dead. The question raised on this petition was whether his share accrued to the shares of the issue of his deceased brothers, or whether there was an intestacy.

*Vernon Smith, K.C.*, and *Fellows*, for the petitioner.

*Hon. E. C. Macnaghten, K.C.*, and *Warlters Horne, Haldane, K.C.*, and *Sheldon, Swinfen Eady, K.C.*, and *Bryan Farrer*, and *Eve, K.C.*, and *Martelli*, for descendants of Matthew Benson Harrison and Wordsworth Harrison.

The testator here had given shares of personal estate to his three sons for their respective lives, and after their decease for their children; and in case any died without children, then to the survivors for life with remainder to their children. If there was nothing further, on the death of one son without children, it must be admitted that the children of a predeceased son would not take anything. If there had been added a gift over in case all the sons died without issue, it would be otherwise. Then the Court would read the word "survivor" as "other." In this will there is no such gift over; but other words are added to the effect that surviving sons are to take in the same manner as their original shares. The Court in this case holds that children of a deceased son participate in the share of a son dying without issue, though their own father did not survive; and it was so laid down as the result of the authorities in the deliberate ruling of Kay J. in *In re Bowman*. (1) This result is obtained by one or other of three modes of construction: (1.) by reading "survivor" to mean "others," (2.) by considering survivorship to refer to stirpital survivorship, or (3.) by regarding the direction that persons to take are to take in the same manner as their original shares as a manifestation by the testator of an intention that those who take original shares are to have accruing shares. We submit that the view of Kay J. is borne out by a review of the authorities as a whole: *Hodge* v. *Foot* (2); *Eyre* v. *Marsden* (3);

(1) 41 Ch. D. 525.
(2) (1865) 34 Beav. 349.
(3) (1839) 4 My. & Cr. 231; 48 R. R. 73.

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*Hawkins* v. *Hamerton* (1); *In re Corbett's Trusts* (2); *King* v. *Frost* (3); *Waite* v. *Littlewood* (4); *Wake* v. *Varah* (5); *Badger* v. *Gregory* (6); *In re Benn* (7); *Beckwith* v. *Beckwith* (8); *In re Walker's Estate* (9); *Lucena* v. *Lucena.* (10)

*Theobald, K.C.*, and *Cave*, for next of kin of the testator. There is an intestacy as to the share of the testator's son Benson. The tendency of the Court is to read the language of wills in its natural sense. The Court will not construe the word "survivor," unless strictly bound by well-settled authority in an exactly similar case, to mean other—a totally different thing; nor will it effect the same thing by artificially implying a provision not expressed, and guessing at what a testator would have wished in the particularly unforeseen event that has happened. In the case particularly relied on—*In re Bowman* (11), before Kay J.—there was no decision on the point now before the Court. The third rule laid down by him has not been approved altogether in *In re Robson.* (12) It was not consistent with a body of decisions, some in the Court of Appeal: *Beckwith* v. *Beckwith* (8); *In re Benn* (7); *In re Corbett's Trusts* (2); *Milsom* v. *Awdry.* (13)

*Hon. E. C. Macnaghten, K.C.*, and *Haldane, K.C.*, in reply.

April 27. COZENS-HARDY J. This petition involves the construction of the will and codicils of Benson Harrison, who died in 1863. He had three sons, (1.) Matthew Benson Harrison, who died in January, 1879, having had three children; (2.) Wordsworth Harrison, who died in June, 1889, having had five children; and (3.) Benson Harrison the younger, who died in November, 1900, without issue. Under these circumstances the question arises who are entitled to a share in the testator's business which the son Benson enjoyed during his life, and also who are entitled to a share in the residue which

(1) (1848) 16 Sim. 410.
(2) (1860) Joh. 591.
(3) (1890) 15 App. Cas. 548.
(4) (1872) L. R. 8 Ch. 70.
(5) (1876) 2 Ch. D. 348.
(6) (1869) L. R. 8 Eq. 78.
(7) (1885) 29 Ch. D. 839.
(8) (1876) 46 L. J. (Ch.) 97; 25 W. R. 282.
(9) (1879) 12 Ch. D. 205.
(10) (1877) 7 Ch. D. 255.
(11) 41 Ch. D. 525.
(12) W. N. (1899) 260.
(13) (1800) 5 Ves. 465; 5 R. R. 102.

he likewise enjoyed for life. [His Lordship read the material parts of the will, and continued:—]

Now, it will be observed that there is no gift over on death of all three sons without issue, either as to the business or as to the residue.

On behalf of the children of Matthew Benson and Wordsworth, it has been argued that they take although their parents did not survive Benson. This contention is based (α) on the ground that there is sufficient matter in this will to justify the Court in reading "surviving" as meaning "other," or (β) on the ground that "surviving" has the meaning of "stirpital" survivorship, or (γ) on the ground that as a matter of construction the gifts are to the surviving sons for life and to the children or issue of the sons whether such sons survive or not.

On behalf of the next of kin it has been argued (δ) that there is no justification for departing from the plain meaning of the language used, and that there is no gift except to the children or issue of sons who survived.

Reading the will without reference to authorities, I think it is reasonably clear that the only children or issue who can take Benson's share are children or issue of such of his two brothers as might survive him, and that, as neither of the two brothers survived him, there are no children or issue who can take. It is not for me to guess whether this is what the testator would have desired. My duty is to construe the language he has used.

But in a will of this nature it is not possible wholly to disregard prior decisions so far as they lay down principles, and my attention has been called, and properly called, to a great many authorities. I do not propose to discuss them at length, more particularly as the wit of man cannot reconcile them all. It is sufficient for me to say that I cannot adopt the view that "surviving" means "other," or means "surviving in person or in descendants," without running counter to *Beckwith* v. *Beckwith* (1), *Lucena* v. *Lucena* (2), *In re Horner's Estate* (3),

(1) 46 L. J. (Ch.) 97; 25 W. R. 282.
(2) 7 Ch. D. 255.
(3) (1881) 19 Ch. D. 186.

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and *In re Benn* (1), three of which are decisions of the Court of Appeal.

I cannot, however, pass over so lightly that which I have called the third argument on the part of the children. It is supported by, if not based upon, the considered judgment of Kay J. in *In re Bowman*. (2) After dealing with the particular will before him, the learned judge lays down three propositions as correctly summing up the law in cases of this nature.

"It seems to me that the decisions establish the following propositions:—

"Where the gift is to A., B., and C. equally for their respective lives, and after the death of any to his children, but if any die without children to the survivors for life with remainder to their children, only children of survivors can take under the gift over.

"If to similar words there is added a limitation over if all the tenants for life die without children, then the children of a predeceased tenant for life participate in the share of one who dies without children after their parent.

"They also participate, although there is no general gift over, where the limitations are to A., B., and C. equally for their respective lives, and after the death of any to his children, and if any die without children to the surviving tenants for life and their respective children, in the same manner as their original shares."

Of these three propositions the first and second seem to be well established, and I adopt them without hesitation. The third proposition, which covers the present case, has caused me considerable difficulty. Kay J. has stated this proposition as the result of the authorities, and it is necessary to consider how far the authorities cited bear out this view and how far those authorities have been overruled. They are *Hodge* v. *Foot* (3), *In re Arnold's Trusts* (4), and *In re Walker's Estate*. (5)

(1) 29 Ch. D. 839.
(2) 41 Ch. D. 531.
(3) 34 Beav. 349.
(4) (1870) L. R. 10 Eq. 252.
(5) 12 Ch. D. 205.

Now, in *Hodge* v. *Foot* (1) Sir John Romilly proceeded partly upon the "scope and object" of the will, and the circumstance that an intestacy would result unless "surviving" was read as "other." It must, I think, be admitted that those reasons cannot now be accepted: see the observation of Fry L.J. in *In re Benn.* (2) Sir John Romilly also relied upon *Harman* v. *Dickenson* (3), where, however, there was a general gift over such as would bring the case within Kay J.'s second proposition, and upon *Hawkins* v. *Hamerton.* (4) In that case Shadwell V.-C. did not lay down any general principle. There was an express direction that "after the decease of my said son and daughters, then I will and direct that the whole of such residue . . . . shall be paid and divided amongst all and every the children of my said son and daughters in equal parts." The class was not limited to children of such of the son and daughters as should survive the wife. And the subsequent, and apparently unnecessary, clause, that in case any of the son and daughters should die without leaving issue, then the share given to him, her, or them so dying should go and be divided "amongst the survivor or survivors of my said children and their issue in the like equal parts shares and proportions" was construed so as to make it consistent with the former gift. This is the view taken of that case by Wood V.-C. in *In re Corbett's Trusts.* (5)

In *In re Arnold's Trusts* (6) Malins V.-C. proceeded upon a view which has since been distinctly repudiated by the Court of Appeal. I may refer to *Wake* v. *Varah.* (7) I think *In re Arnold's Trusts* (6) cannot be regarded as a binding authority: see the observation of Lindley L.J. in *In re Benn.* (8) *In re Walker's Estate* (9) was a decision of Hall V.-C.; but in the subsequent case of *In re Horner's Estate* (10) the Vice-Chancellor in effect said (11) that his earlier decision could not be supported having regard to *Beckwith* v. *Beckwith.* (12) It is, I think, not incorrect to say that not one of the three decisions relied upon

(1) 34 Beav. 349.
(2) 29 Ch. D. 842.
(3) (1781) 1 Bro. C. C. 91.
(4) 16 Sim. 410.
(5) Joh. 591.
(6) L. R. 10 Eq. 252.
(7) 2 Ch. D. 348.
(8) 29 Ch. D. 841.
(9) 12 Ch. D. 205.
(10) 19 Ch. D. 186.
(11) Ibid. 191.
(12) 46 L. J. (Ch.) 97; 25 W. R. 282.

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by Kay J. as warranting his third proposition can now be regarded as satisfactory, or as laying down any principle which a judge of co-ordinate jurisdiction ought to follow.

Against these decisions there is a considerable body of authority. I refer especially to *Milsom* v. *Awdry*. (1) There there was a residuary bequest to the testator's nephews and nieces equally per stirpes for their lives, and after the death of either of his said nephews and nieces his or her share to be paid equally unto and among his or her children. And if any of his said nephews and nieces should die without leaving any child, then the share or shares of him, her, or them so dying "should go to and among the survivors or survivor of them in manner aforesaid." The Master of the Rolls held that the words "in manner aforesaid" meant in the same manner as the original share—namely, for life only, and that the share of each, both original and accruing, went to the children, if any. This seems to be precisely the case contemplated by Kay J.'s third proposition. But the Master of the Rolls held that on the death of the last nephew without issue there would be an intestacy, although there were children of deceased nephews and nieces. *Milsom* v. *Awdry* (1) was approved by Wood V.-C. in *In re Corbett's Trusts* (2), which is indeed a strong decision in the same sense. It is true that Malins V.-C. in *In re Arnold's Trusts* (3) said he was satisfied that *Milsom* v. *Awdry* (1) was "contrary to a long line of subsequent authorities, and that it is no longer a binding authority." But for the reasons above stated, and having regard to the judgments of the Court of Appeal, I am not able to accept this view. *Milsom* v. *Awdry* (1) must, I think, be considered as good law.

It follows that in my opinion the third proposition in *In re Bowman* (4) is not warranted by the authorities, and I must decline to follow it. In my view it makes no difference whether the gift of an accruing share is to the survivors for life with remainder to their children expressly, or is to the survivors and their children by reference to the limitations of the original shares.

(1) 5 Ves. 465; 5 R. R. 102.
(2) Joh. 591.
(3) L. R. 10 Eq. 252, 256.
(4) 41 Ch. D. 525.

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I must therefore declare that on the death of Benson without issue, his share in the business fell into the residue, and that there is an intestacy as to his share of residue thus augmented.

This declaration will probably suffice to enable minutes to be prepared for effecting the division of the funds.

Solicitors: *Dowson, Ainslie & Martineau; Goodale & Hobson; A. H. Arnould & Son.*

D. P.

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*March* 14, 21, 22.

## *In re* HOLLAND. GREGG *v.* HOLLAND.

[1900 H. 3732.]

*Fraudulent Conveyance—Protection of Creditors—Post-nuptial Settlement—Recital of Ante-nuptial Agreement—Wife's Chose in Action—Husband's Interest determinable on Bankruptcy—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 4—13 *Eliz. c.* 5.

An ante-nuptial agreement made upon consideration of marriage cannot support a post-nuptial settlement unless the agreement, or a memorandum or note thereof, is signed before the marriage, pursuant to s. 4 of the Statute of Frauds. The mere recital of such an ante-nuptial agreement in the post-nuptial settlement, even if sufficiently precise to bind the settlor and volunteers claiming under him by estoppel, does not bind creditors.

By a post-nuptial settlement dated February 8, 1873, reciting that previously to the marriage the husband agreed to make such settlement of his wife's fortune as was thereinafter contained, the husband, being entitled in the right of his wife, then an infant, to a reversionary interest in personalty, subject to the contingency of his predeceasing her without reducing it into possession, covenanted that on the fund falling into possession he and his wife would assign it to the trustees on the usual trusts for the wife, husband, and issue of the marriage, the husband's life interest being made determinable on bankruptcy. The wife died before the fund fell into possession, so that she never became entitled to assert her equity to a settlement:—

*Held*, that, as against the husband's trustee in bankruptcy, the settlement was void in toto under the statute of 13 Eliz. c. 5.

*In re Pearson*, (1876) 3 Ch. D. 807, followed.

*Montefiore* v. *Behrens*, (1865) L. R. 1 Eq. 171, distinguished.

ADJOURNED SUMMONS.

Under the will of Henry Holland, dated April 26, 1871, Charlotte Fanny Holland, on attaining twenty-one or marrying,

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was entitled in remainder expectant on the death of the testator's widow to one-eighth share of the proceeds of sale of his residuary real and personal estate. The testator died on December 12, 1871. On August 27, 1872, Charlotte Fanny Holland intermarried with Isidore M. Bourke. On February 8, 1873, a post-nuptial settlement was executed by deed made between Isidore M. Bourke and Charlotte Fanny, his wife, then an infant, of the first part, the widow and the trustees of the will, guardians of Mrs. Bourke, of the second part, and the trustees of the settlement of the third part. This deed contained the following recital: "And whereas the said parties hereto of the first part intermarried on the 27th day of August, 1872, and previously to such marriage the said Isidore M. Bourke agreed to make such settlement of the fortune of his said wife as is hereinafter contained"; and a covenant by the husband with the trustees that immediately upon the share and interest of and in the residuary estate and effects of the said Henry Holland, to which the husband and wife or the husband in her right or either of them then were or was or thereafter might become entitled, becoming an interest in possession, the husband and wife or the survivor of them, and all other necessary parties, would assign or transfer the said share to the trustees of the settlement upon trust to pay the income to the wife for life for her separate use without power of anticipation, and after her death, if the husband should survive her and should not have been or become a bankrupt or assigned the said income or any part thereof, upon trust to pay the said income to the husband for life, or until he should become a bankrupt, or assign the same income or some part thereof, and subject thereto, in trust for the children or other issue of the marriage as the husband and wife should by deed appoint, and, failing such joint appointment, as the survivor should by deed or will appoint, and in default of such appointment, in trust for the children of the marriage who being sons should attain the age of twenty-one years, or being daughters should attain that age or marry under that age with the consent of their guardians, in equal shares, with the usual hotchpot clause.

On April 14, 1877, the wife, who had attained the age of twenty-three, died intestate, leaving her husband and three sons her surviving. The joint power of appointment was not exercised.

On October 25, 1897, the husband appointed two-thirds of the trust funds to two of his sons, and surrendered to them his life interest in those two-thirds.

On March 1, 1898, a receiving order was made against the husband, and on March 18, 1898, he was adjudicated bankrupt, the official receiver being his trustee.

On December 11, 1899, the testator's widow died, and the fund fell into possession. This summons was issued to determine whether it was bound by the settlement or belonged to the official receiver.

*W. H. Cozens-Hardy*, for the trustees of the will, stated the facts.

*Aubrey St. John Clerke*, for the trustees and beneficiaries claiming under the settlement. Assuming that the settlement is binding, the surrender of October 25, 1897, operated as a forfeiture of the husband's life interest, so that nothing passed to the official receiver on the subsequent bankruptcy: *In re Detmold* (1); *In re Brewer's Settlement.* (2) I admit that as the settlement rested in fieri, it required the marriage consideration to support it, but that is given by the ante-nuptial agreement therein recited.

As between the parties, the recital is good evidence of an ante-nuptial agreement and a sufficient memorandum thereof to satisfy the Statute of Frauds: *Dundas* v. *Dutens* (3); *Codrington* v. *Lindsay.* (4) The parties are estopped from denying the truth of the recital. The intention being clearly expressed in the settlement, the parties would have been bound to do all things necessary to carry out that intention: *Young* v. *Smith* (5); *Buckland* v. *Buckland.* (6) The official receiver merely stands in the bankrupt's shoes, and is bound by all his

(1) (1889) 40 Ch. D. 585.
(2) [1896] 2 Ch. 503.
(3) (1790) 1 Ves. Jr. 196, 199; 2 Cox, 235; 1 R. R. 112.
(4) (1872) L. R. 8 Ch. 578, 588.
(5) (1865) L. R. 1 Eq. 180, 184.
(6) [1900] 2 Ch. 534.

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equities, including estoppel: *Harris* v. *Truman*. (1) Letters of administration to the wife's estate must no doubt be taken out before the fund can be handed over: *Smart* v. *Tranter*. (2)

*Upjohn, K.C.*, and *Alfred Adams*, for the official receiver. If the settlement is binding, the life interest has passed to the official receiver, as the surrender of October 25, 1897, was not an assignment within the forfeiture clause, and in any case the appointees cannot both claim under the appointment and enforce the forfeiture.

But the settlement in the events that have happened is not really binding. It was not a complete disposition of the property as in *In re Walhampton Estate*. (3) It was merely a voluntary covenant to settle the wife's reversionary chose in action. This did not fall into possession until after the death of the wife, when it became the husband's property subject to his taking out administration to her estate. The voluntary covenant to settle it does not bind the official receiver.

Notwithstanding the dictum in *Dundas* v. *Dutens* (4), the mere recital of an ante-nuptial agreement in a post-nuptial settlement is insufficient to satisfy the Statute of Frauds, and the post-nuptial settlement must be treated as voluntary: *Spurgeon* v. *Collier* (5); *Warden* v. *Jones* (6); *Randall* v. *Morgan* (7); *Trowell* v. *Shenton* (8); *Ex parte Whitehead*. (9) The contrary view would throw on the official receiver the burden of proving that the recital was untrue, which is obnoxious to the policy of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 47. In *Buckland* v. *Buckland* (10) the settlement was ante-nuptial and the fund was in possession; and in *Codrington* v. *Lindsay* (11) there were words of assignment de præsenti, so the recital was immaterial. In any case the recital cannot bind the official receiver, whether by estoppel or otherwise: *Battersbee* v. *Farrington*. (12)

(1) (1882) 9 Q. B. D. 264.
(2) (1890) 43 Ch. D. 587.
(3) (1884) 26 Ch. D. 391.
(4) 1 Ves. Jr. 196, 199; 2 Cox, 235; 1 R. R. 112.
(5) (1758) 1 Eden, 55, 61.
(6) (1857) 2 De G. & J. 76, 85.
(7) (1805) 12 Ves. 67; 8 R. R. 289.
(8) (1878) 8 Ch. D. 318, 324, 326.
(9) (1885) 14 Q. B. D. 419.
(10) [1900] 2 Ch. 534.
(11) L. R. 8 Ch. 578, 588.
(12) (1818) 1 Swans. 106, 113; 18 R. R. 32.

A voluntary settlement may be set aside under the statute of 13 Eliz. c. 5, without proof of actual intention to defeat or delay creditors, if the circumstances are such that the settlement must necessarily have that effect: *Freeman* v. *Pope* (1); and the fact that the settlor's interest is made determinable on bankruptcy is sufficient in itself to render the settlement fraudulent within the statute: *In re Pearson.* (2)

*Aubrey St. John Clerke*, in reply. In *In re Pearson* (2) the husband settled his own property. In the present case he settled his wife's chose in action. This is valid: *Montefiore* v. *Behrens.* (3)

[FARWELL J. That case turned on the wife's equity to a settlement.]

In the present case there might have been such an equity, as the fund might have fallen into possession during the coverture. It was, therefore, impossible to say at the date of the settlement that it would necessarily defeat or delay creditors, and, unless it was void in its inception, it cannot be invalidated by subsequent events. *In re Pearson* (2) is really inconsistent with *In re Detmold* (4), and ought not to be followed.

*Cur. adv. vult.*

March 22. FARWELL J. stated the facts, and continued:— It is conceded by Mr. Clerke that the settlement rests in fieri and cannot be enforced unless it can be supported by the consideration of marriage, and he relies on the recital of an antenuptial contract, which I have already read. The first question that I have to determine is whether the settlement of February 8, 1873, containing such a recital is sufficient to satisfy the Statute of Frauds. In my opinion it is now settled that in the absence of such a recital a parol contract before marriage cannot support a settlement made after marriage. The cases are conflicting, but this is, in my opinion, the conclusion on the balance of authorities. In *Hodgson* v. *Hutchenson* (5) it is reported as

(1) (1870) L. R. 5 Ch. 538.
(2) 3 Ch. D. 807.
(3) L. R. 1 Eq. 171.
(4) 40 Ch. D. 585.
(5) (1712) 5 Vin. Abr. 522, pl. 34. [The italics and punctuation are as here reproduced.]

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follows: "*A father encourages the courtship of his son with another's daughter,* who *proposes by letter to give her* 500*l. if the father would settle* 100*l. per annum on the son which is refused; The son and daughter marry privately, and after this letter is written; then he, that refused, consented, and he, that consented, refused.* On a bill for performance of this agreement it was objected, that these promises were within the Statute of Frauds, and that the letter being after the marriage should not bind; but decreed contra on circumstances of the father's privity and consent to the match and of the marriage by afterwards approving of it. That it was out of the statute if no letter, for *the agreement is admitted by the answer*; but this case doth not depend on parol evidence or admissions; for *the letter after marriage, considering the transactions before, is sufficient.* The offer to settle 100*l.* per ann. shall be in tail, with a power to the husband to charge it with 500*l.* for younger children, being the mother's portion, and decreed accordingly; per Harcourt, Lord Keeper." The first ground on which this was decided is that where the agreement is admitted by the answer the statute cannot be pleaded, and this was correct at that time, although it is no longer law: see *Moore* v. *Edwards* (1); *Blagden* v. *Bradbear.* (2) The second ground is so concisely stated in the report that it is difficult to say what it really amounts to. *Montacute* v. *Maxwell* (3), as reported in 1 Eq. C. Ab. 19, pl. 4, and Prec. Ch. 526, was a case of fraud, the reduction of the agreement into writing having been prevented by the fraud and practices of the party to be bound. In the report of the same case in 1 Strange, 236, 237, Parker L.C. says: "But such parol promise on marriage is sufficient consideration, to support a settlement made agreeable to it after marriage. This has been frequently determined. So it is also sufficient consideration to establish a promise made in writing after marriage." Lord St. Leonards (Powers, 8th ed. p. 647) treats this as a mere dictum, and the editor of Eden's Reports, in a note at vol. i. p. 62, says

(1) (1798) 4 Ves. 23.

(2) (1806) 12 Ves. 466, 471; 8 R. R. 354.

(3) (1719) 1 Eq. C. Ab. 19, pl. 4; Prec. Ch. 526; 1 Str. 236, 237; 1 P. Wms. 618.

that there is no decision to warrant such a dictum. The report of this case in 1 P. Wms. 618, which was cited in *Warden* v. *Jones* (1), does not contain the second hearing of this case in which this dictum is stated. In *Taylor* v. *Beech* (2) the defendant pleaded the statute in bar to discovery, as well as to relief, and I read the case as confined to this—that Hardwicke L.C. thought that there were circumstances which might raise an equity in the plaintiff's favour if full discovery was made, and that he would not shut out such circumstances by refusing discovery. In *Surcome* v. *Pinniger* (3) there is a dictum of Turner L.J.: "But it has been held, in many cases, that if there be a written agreement after marriage in pursuance of a parol agreement before marriage, this takes the case out of the statute." This dictum was not necessary for the decision, and the Lord Justice does not refer to any case except *Taylor* v. *Beech* (2), which he treats as a case of part performance by acts other than mere marriage. In *Barkworth* v. *Young* (4) Kindersley V.-C. decided that a statement of a parol agreement in an affidavit made after the marriage by the party to be charged was sufficient to satisfy the statute. He says: "The defendant objects, that, supposing this was in every other respect a sufficient note or memorandum in writing, it was not made till after the marriage, and, therefore is not good within the intent of the statute. And the opinion expressed by Sir W. Grant in *Randall* v. *Morgan* (5) is relied upon. Sir W. Grant's opinion is expressed in the form of a strong doubt, and unquestionably even the doubts of such a judge are entitled to the utmost consideration and deference. But, notwithstanding that doubt, it has been since held by Lord Langdale in *De Beil* v. *Thomson* (6), and by Lord Cottenham in the same case on appeal reported in a note to *Hammersley* v. *De Biel* (7), that a written memorandum or note made after the marriage of a parol agreement made before the marriage would be sufficient within the statute; the former

(1) 2 De G. & J. 76, 85.
(2) (1749) 1 Ves. Sen. 297.
(3) (1853) 3 D. M. & G. 571, 575.
(4) (1856) 4 Drew. 1, 12.
(5) 12 Ves. 67; 8 R. R. 289.
(6) (1841) 3 Beav. 469.
(7) (1841) 12 Cl. & F. 45, 61, n., 64, n.

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referring to Lord Harcourt's opinion in *Hodgson* v. *Hutchenson* (1), and the latter referring not only to that case, but also to Lord Hardwicke's decision in *Taylor* v. *Beech* (2) and to that of Lord Macclesfield in *Montacute* v. *Maxwell.* (3) All these opinions must, I think, outweigh Sir W. Grant's doubt." I have already referred to two of the cases on which Kindersley V.-C. relied, and with regard to *De Beil* v. *Thomson* (4) and *Hammersley* v. *De Biel* (5), I would point out with all respect that Lord Langdale did not decide the case on the ground that a subsequent memorandum would satisfy the statute, but said that the subsequent letter was either a sufficient note to satisfy the statute or a sufficient adoption of an ante-nuptial contract purporting to have been entered into by his sons in writing on his behalf; and, further, that Lord Cottenham in *Lassence* v. *Tierney* (6) expressly stated that his judgment in *Hammersley* v. *De Biel* (5) turned on part performance by acts other than the mere marriage. Except so far, therefore, as *Hodgson* v. *Hutchenson* (1) is an authority, I come to the conclusion that the judgment of Kindersley V.-C. was not supported by express authority.

On the other hand, in addition to the dictum of Sir William Grant in *Randall* v. *Morgan* (7), there are three cases of the highest authority which, in my opinion, shew that *Barkworth* v. *Young* (8) cannot be supported. In *Spurgeon* v. *Collier* (9) there was a settlement made after marriage; evidence was tendered of an antecedent parol agreement; the evidence failed, but Lord Northington says: "Secondly, if proved, it would not better the case. It is admitted, that, since the statute, though such promise was made, Dr. Alston could have no remedy. Then the settlement was voluntary, for it could not be compelled. It was made to a person having no right to demand it; for where there is no remedy, there is no right. But, if such a parol agreement

(1) 5 Vin. Abr. 522, pl. 34.
(2) 1 Ves. Sen. 297.
(3) 1 Eq. C. Ab. 19, pl. 4; Prec. Ch. 526; 1 Str. 237; 1 P. Wms. 618.
(4) 3 Beav. 469.
(5) 12 Cl. & F. 45, 61, n., 64, n.
(6) (1849) 1 Mac. & G. 551, 572.
(7) 12 Ves. 67; 8 R. R. 289.
(8) 4 Drew. 1, 12.
(9) 1 Eden, 55, 61.

were to be allowed to give effect to a subsequent settlement, it would be the most dangerous breach of the statute, and a violent blow to credit. For any man, on the marriage of a relation, might make such promise, of which an execution never could be compelled against the promisor, and the moment his circumstances failed, he would execute a settlement pursuant to his promise, and defraud all his creditors." I read this as a clear expression of the Lord Keeper's opinion that such an agreement, although followed by a settlement in pursuance of it, cannot satisfy the statute. In *Warden* v. *Jones* (1) creditors filed a bill to set aside a settlement as fraudulent within the statute of Elizabeth. Cranworth L.C. assumed the existence of an antecedent parol agreement, and decided that it was not sufficient to satisfy the statute so as to give consideration to the settlement made after marriage in pursuance of such agreement. Finally, in *Trowell* v. *Shenton* (2), Jessel M.R. says: "Some observations were made during the argument as to the effect of a subsequent acknowledgment in writing of a contract, and *Barkworth* v. *Young* (3) was referred to in support of the contention that the settlement was for value, though there was no ratification till after the marriage. The answer to this is given by *Warden* v. *Jones* (1), which is subsequent in date to *Barkworth* v. *Young* (3), and therefore, so far as the two are inconsistent, overrules it. Lord Cranworth, there referring to a post-nuptial settlement reciting that it was made in pursuance of an ante-nuptial agreement, says (4): 'Lord Thurlow decided in *Dundas* v. *Dutens* (5) that such a settlement is good, and on that decision I will only remark, that if it be a correct view of the law, the whole policy of the statute is defeated. It cannot be enough merely to say in writing, that there was a previous parol agreement. It must be proved that there was such an agreement, and to let in such proof is precisely what the statute meant to forbid.' In that short passage the Lord Chancellor disposed of all the other authorities." And Cotton L.J. says: "It was urged that,

(1) 2 De G. & J. 76, 85.
(2) 8 Ch. D. 318, 324, 326.
(3) 4 Drew. 1, 12.
(4) 2 De G. & J. 85.
(5) 2 Cox, 235.

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though no action could be maintained for breach of the agreement, yet the settlement was not to be treated as voluntary. *Warden* v. *Jones* (1) appears to me to decide the exact contrary of this contention. The consideration was held to be insufficient in that case, because the Statute of Frauds provided 'that no action shall be brought whereby to charge any person upon any agreement made upon consideration of marriage, unless the agreement upon which such action shall be brought, or some note or memorandum thereof, shall be in writing, signed,' &c. Here the question does not turn on the Statute of Frauds, but on Lord Tenterden's Act; but if in one case it is held that a parol contract before marriage cannot support a settlement made after marriage, so here a settlement cannot be supported by an infant's contract of which there is no written confirmation." See also Sugden on Powers, 8th ed. pp. 647–650. In both of the last cases the Court expressly pointed out that there was no recital of any ante-nuptial agreement, and the next question that I have to consider is whether the existence of such a recital makes any difference. In my opinion it does not. The decision of the Courts that a post-nuptial settlement is not supported by an ante-nuptial parol agreement involves the proposition that no post-nuptial settlement can by itself satisfy the statute. It is the date of execution, not the contents of the document, that is material. Recitals may in some cases raise a case of estoppel, but they cannot affect the construction of a statute, nor can the same document be at one and the same time an agreement within and an agreement not within the statute, according as it is impeached by a settlor or his creditors. The question, What is the meaning of "an agreement sufficient to satisfy the statute"? must be answered in the same way in all cases.

Further, I come to the same conclusion on the construction of the statute. Sect. 4 enacts that no action shall be brought whereby to charge any person upon any agreement made upon consideration of marriage unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged there-

(1) 2 De G. & J. 76.

with or some other person thereunto by him lawfully authorized. An agreement or memorandum or note thereof to satisfy the statute must, in my opinion, be reduced into writing and signed before the marriage. True that the statute does not render the agreement void or illegal, but it renders written evidence of it indispensable: *Maddison* v. *Alderson*. (1) An agreement which a man cannot be compelled to perform is a voluntary agreement. He cannot be compelled to perform the ante-nuptial agreement, because it is parol; nor the post-nuptial, because it is founded on a past consideration, and fails, therefore, to possess that essential part of a contract—the consideration for value—for it is well settled that a past consideration will not support a present promise; and the contract in consideration of marriage differs from contracts for sale, within ss. 4 and 17 of the statute, as to which it has been held that the agreement must be signed before action—*Lucas* v. *Dixon* (2)—because the marriage is performed once for all and is irrevocable. But in contracts for sale the consideration continues, for, if the whole purchase-money has not been paid, the balance unpaid remains a consideration at the date of the contract, and, if the whole has been paid, the purchaser can recover it back if the contract is repudiated. I do not forget that the post-nuptial agreement here is under seal; but this is immaterial for the present purpose, for equity will not aid a voluntary covenant by specific performance: *Jefferys* v. *Jefferys* (3); and Mr. Clerke is claiming the fund in specie, not damages for breach of covenant. Is there, then, any authority that prevents my holding in accordance with my own opinion? It is very doubtful whether Lord Thurlow's opinion in *Dundas* v. *Dutens* (4) amounts to more than a dictum. It is certainly a mere dictum as reported in Vesey: "If the husband made an agreement, that he would settle, and then in fraud of that agreement got married, would not he be bound by it? I thought, there was a case in point for that. What the settlement might be, if made upon himself after marriage is another question. But in Eq. Cas. Ab."—

(1) (1883) 8 App. Cas. 467, 488.
(2) (1889) 22 Q. B. D. 357.
(3) (1841) Cr. & Ph. 138.
(4) 1 Ves. Jr. 196, 199; 2 Cox, 235; 1 R. R. 112.

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which I apprehend is the case of *Montacute* v. *Maxwell* (1), to which I have already referred—" where there was an agreement before marriage, and the father drew the man in, and was privy to his having married without any execution, and then refused to execute, relief was given. If in this case there was an agreement before marriage, and afterwards he drew her in to be married, and then refused to perform it, it appears to me to be that kind of fraud, against which this Court will relieve. If there is a parol agreement for a settlement upon marriage, after marriage a suit upon the ground of part performance would not do, because the statute is expressed in that manner; but is there any case, where in the settlement the parties recite an agreement before marriage, in which it has been considered as within the statute? *Solicitor-General* (2) said he did not think it would be good." And Sir William Grant so treats it in *Randall* v. *Morgan* (3); and although Lord Ellenborough calls it a decision in *Shaw* v. *Jakeman* (4), he refers to the report in Vesey, where it is not more than a dictum. In 2 Cox, 235, it is reported as a decision; but I think Vesey's report, supported as it is by Sir William Grant, is the more trustworthy. I have considered this in detail, because, if Lord Thurlow decided the point, Lord Cranworth's dictum could not overrule it, and it would, of course, be binding on me. But I think that it is only dictum, and that it is outweighed by the dicta of Lord Cranworth in *Warden* v. *Jones*. (5) After criticising *Dundas* v. *Dutens* (6) in the passage I have already read from the judgment of Jessel M.R. in *Trowell* v. *Shenton* (7), and after stating that in *Randall* v. *Morgan* (3) Sir W. Grant clearly thought that a written recognition after marriage of a verbal promise made before marriage would be invalid, Lord Cranworth says: " This most reasonable construction of the statute is consistent with the decision of Lord Cottenham in *Lassence* v. *Tierney* (8),

(1) 1 Eq. C. Ab. 19, pl. 4; Prec. Ch. 526; 1 Str. 237; 1 P. Wms. 618.

(2) Sir John Scott, afterwards Lord Eldon. [This remark is in the edition of Vesey dated 1814, but not in the edition of 1827, which is the one in common use.—F. P.]

(3) 12 Ves. 67; 8 R. R. 289.

(4) (1803) 4 East, 201.

(5) 2 De G. & J. 76, 86.

(6) 1 Ves. Jr. 196, 199; 2 Cox, 235; 1 R. R. 112.

(7) 8 Ch. D. 318, 324, 326.

(8) 1 Mac. & G. 551, 572.

and though the precise question does not arise in the case now before me, I have thought it right to advert to these authorities, in order that it may not be thought I decide the present case merely on the ground that it is distinguishable from *Dundas* v. *Dutens*. (1) I incline to think that, even if this settlement had contained a statement that it was made in pursuance of a previous ante-nuptial parol agreement, I should still have considered it, as I now consider it, void against creditors." This was approved by the Court of Appeal in *Trowell* v. *Shenton* (2), and by Lord St. Leonards, Powers, 8th ed. p. 649. Mr. Clerke placed great reliance on a passage in Lord Selborne's judgment in *Codrington* v. *Lindsay* (3): "What, then, are the considerations for the settlement of the Bank of Bengal shares, and the 6213*l*. Consols, and 4562*l*. reduced stock, expressed on the face of the deed of March the 31st, 1850? First, I find in it an express recital 'that upon the treaty for the marriage it was agreed' (which I take to mean agreed between the plaintiff's father and her husband), that as well the two several sums of 6213*l*. Consols and 4562*l*. reduced stock (which had been then actually transferred into the names of the trustees of the deed), as also all the interest of the plaintiff or of her husband in her right under the settlement of the 17th of August, 1824 (i.e., her interest in the 80,000 S.R.) 'should be settled upon the trusts and in the manner thereinafter mentioned.' This recital cannot, as against any person not a party to it, alter the consideration or the true character of the deed, or supply the want of other evidence of a binding ante-nuptial contract: *Warden* v. *Jones*. (4) But I apprehend it is good evidence as between the father and the husband, at all events, of the terms of and the considerations for their agreement inter se." In that case, as well as in *Battersbee* v. *Farrington* (5), there was an express recital of an ante-nuptial contract contained in the post-nuptial settlement. The true meaning of Lord Selborne's statement is illustrated by Sir Thomas Plumer's judgment in *Battersbee* v. *Farrington* (5): "On the first question, (which I

(1) 1 Ves. Jr. 196, 199; 2 Cox, 235; 1 R. R. 112.
(2) 8 Ch. D. 318, 324, 326.
(3) L. R. 8 Ch. 578, 588.
(4) 2 De G. & J. 76, 85.
(5) 1 Swans. 106, 113; 18 R. R. 32

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am not now to decide,) the distinction, I apprehend, is, that against all persons claiming under the settlor the recital is conclusive; but it would be difficult to maintain, that a recital in a post-nuptial settlement of ante-nuptial articles, of the existence of which there is no distinct proof, would be binding on creditors. Such a doctrine would give to every trader a power of excluding his creditors by a recital in a deed to which they are not parties. In this instance there appears no motive for the recital if untrue; a recital in a deed executed before the party engaged in trade, when he was not indebted, and twenty years prior to his death." The meaning is that, although the post-nuptial settlement does not satisfy the statute, the recital of an ante-nuptial contract may bind the party making it, and volunteers claiming under him, by estoppel, and Mr. Clerke has accordingly argued that the trustee in bankruptcy stands in no better position than the bankrupt, and is as much bound by estoppel as the bankrupt himself would be. Now, it is no doubt true as a general proposition that the trustee in bankruptcy stands in the bankrupt's shoes, but this is subject to several exceptions. It is only necessary here to mention three: (1.) under s. 47 of the Bankruptcy Act; (2.) under the statute of Elizabeth; and (3.) in cases of fraud. In the first two cases the trustee has a paramount right by statute which overrides the title of the bankrupt and persons claiming under settlements made by him. The third exception is not peculiar to the trustee in bankruptcy, but is of more general application. It is conceded that the first exception is excluded in the present case, both by the terms of the section itself and by the time that has elapsed. I will deal with the second exception presently. The third exception may be stated in Martin B.'s words in *Horton* v. *Westminster Improvement Commissioners* (1): "The meaning of estoppel is this—that the parties agree, for the purpose of a particular transaction, to state certain facts as true; and that, so far as regards that transaction, there shall be no question about them. But the whole matter is opened where the statement is made for the purpose of concealing an illegal contract; for persons cannot

(1) (1852) 7 Ex. 780, 791.

be allowed to escape from the law by making a false statement." See also *Doe* v. *Lloyd* (1), where the heir-at-law of a grantor was allowed on this ground to impeach the validity of his ancestor's deed. To return to the second exception. The statute 13 Elizabeth avoids voluntary settlements made with a view to defeat or defraud creditors. When the husband entered into the covenant of February 8, 1873, he was entitled jure mariti to the property in question, which was a reversionary interest in personalty, subject only to the contingency of his wife's surviving him before he had reduced it into possession. By that settlement he expressly provided that his property should be withdrawn from his creditors in case he became a bankrupt. It is, therefore, fraudulent within the statute 13 Elizabeth according to the case of *In re Pearson* (2), the authority of which is not affected by *In re Detmold* (3), which was the case of a marriage settlement, while *In re Pearson* (2) was a voluntary settlement, and is, therefore, on all fours with the present case. Mr. Clerke argued that *In re Pearson* (2) stood alone, and was wrongly decided, but I am not aware that it has ever been doubted, and it is right that I should follow it. He also cited *Montefiore* v. *Behrens* (4), but the reasoning on which Romilly M.R. proceeded in that case is inapplicable to the present; he put it on the ground that the fund was the wife's property, and that she was entitled to enforce her equity to a settlement. But here there was no such right in the wife, because the property was a contingent reversionary interest in personalty: see *Osborn* v. *Morgan* (5), and she was dead long before the fund fell into possession, and the right is, of course, personal to her. I am of opinion, therefore, that the trustee in bankruptcy would not be bound by estoppel if any such arose. But I am further of opinion that the recital is not sufficiently precise to create an estoppel. It is quite consistent with the existence of a mere parol agreement; for a pleader might insert the very words of that recital in his defence, and yet plead that such agreement was not in writing, so as to

(1) (1839) 5 Bing. N. C. 741.
(2) 3 Ch. D. 807.
(3) 40 Ch. D. 585.
(4) L. R. 1 Eq. 171.
(5) (1852) 9 Hare, 432.

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satisfy the Statute of Frauds. Even if the recital had been of an agreement in writing, it would have been open to the trustee in bankruptcy to adduce evidence to shew that it was untrue, and, if it were untrue, it would be fraudulent within Martin B.'s judgment cited above. It has not been argued that the deed of October 25, 1897, has any independent validity or effect, and the other points made on this deed and otherwise in the case, do not arise in the view that I take of the matter.

I therefore hold that the official receiver, on taking out letters of administration to the wife's estate, is entitled to the fund. The costs of all parties will come out of the fund.

Solicitors: *Henry Clifton Lambert; Van Sandau & Co.; Tarry, Sherlock & King.*

G. R. A.

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FARWELL J. 1901 *May* 7, 13.

## POWELL *v.* BRODHURST.

[1900 P. 1900.]

*Mortgage—Joint Account—Payment to One Mortgagee—Partnership—Separate Debt—Payment to Firm.*

Where mortgagees have advanced money on a joint account, payment to one of them during the others' lifetime, though a good discharge of the debt at law, only discharges the security to the extent of the payee's beneficial interest (if any), even though the payee ultimately becomes the survivor in the joint account.

*Matson* v. *Dennis*, (1864) 4 D. J. & S., 345, followed.

*Steeds* v. *Steeds*, (1889) 22 Q. B. D. 537, explained.

Payment to a firm of a separate debt due to a partner will not support a plea of payment to that partner in the absence of evidence, express or implied, that he has authorized the firm to receive it.

WITNESS ACTION.

By an indenture dated March 1, 1872, the defendant mortgaged real estate at Worksop to Barnett and Birch to secure 6000*l.* and interest, the 6000*l.* being expressed to be advanced out of moneys belonging to the mortgagees on a joint account, and the defendant covenanting to repay the money on September 1, 1872.

In 1875 1000*l.*, part of the 6000*l.*, was paid to the firm of

Ingram, Harrison & Ingram, solicitors, and duly applied in part discharge of the mortgage debt.

Birch survived Barnett, and died on April 8, 1878, having devised his mortgage estates to his executor.

By an indenture dated September 1, 1878, Birch's executor transferred the mortgage debt and security to Cartmell Harrison and James Crofts Ingram, two of the partners in the firm, in consideration of 5000*l.* paid by them out of moneys expressed to belong to them on a joint account.

In 1886 the defendant paid another 1000*l.* to the firm, which was duly applied in part discharge of the mortgage debt.

By an indenture dated August 19, 1890, Cartmell Harrison and James Crofts Ingram transferred the mortgage debt and securities to Francis Baron de Paravicini and James Ingram, another partner in the firm, as joint tenants, in consideration of 4000*l.* paid by the transferees.

These transferees were trustees of a settlement, but of this fact the defendant had no notice.

In 1892 the defendant sent another 1000*l.* to the firm, which was acknowledged by Cartmell Harrison as received in part discharge of the mortgage debt, and the interest, which was throughout paid to the firm, was thenceforth paid on 3000*l.* only. This sum of 1000*l.* was paid into the banking account of the firm, and credited by the firm to the defendant, but it was not in fact applied in discharge of the mortgage, and the firm still continued to account to the beneficiaries under the settlement for interest on 4000*l.*

On September 26, 1897, Francis Baron de Paravicini died.

On December 25, 1897, James Ingram died, and on May 1, 1900, his executors transferred the mortgage debt and security to the plaintiffs, the new trustees of the settlement.

The plaintiffs, who alleged that 4000*l.* was still due on the covenant and security, claimed an account of what was due under the covenant, and an order for payment, and an account of what was due under the mortgage, and foreclosure.

The defendant admitted that 3000*l.* was due, denied his liability to pay any more, and claimed to redeem on that footing.

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It appeared that James Ingram, who was taken ill at the end of 1891, had not come to the office at all in 1892, and, though he came for a few days in 1893 and 1894, he never attended personally to any business after 1891. Neither he nor his co-trustee had expressly authorized the firm to receive the 1000*l.* paid in 1892, and it was very possible that neither of them knew of the payment.

As the onus of substantiating the part payment lay on the defendant, his case was opened first.

*Upjohn, K.C.*, and *George Cave*, for the defendant. The payment to the firm was a payment to the partner, James Ingram, as having means of knowledge that the money had been paid into the firm's account, he could have been sued for money had and received: *Blair* v. *Bromley* (1); *Marsh* v. *Keating* (2); *Rhodes* v. *Moules* (3); *Jacobs* v. *Morris*. (4)

The usual joint account clause being read into the transfer of August 19, 1890, by virtue of s. 61 of the Conveyancing Act, 1881, James Ingram's receipt acquired validity on his surviving his co-mortgagee, as he was then in a position to ratify it, or to give a new valid receipt. Even if this is not so, the receipt actually given was at all events good as against James Ingram's apparent moiety of the debt, which exceeded 1000*l.*

Payment of a debt to a joint creditor was a good discharge as to the whole at common law: *Wallace* v. *Kelsall* (5), even in the case of trustees: *Husband* v. *Davis* (6); but since the Judicature Act, 1873 (36 & 37 Vict c. 66), s. 25, sub-s. 11 providing that the rules of equity shall prevail, the debt is presumed to be held in common according to the equitable rule in *Petty* v. *Styward* (7), *Rigden* v. *Vallier* (8), and *Morley* v. *Bird* (9); and payment to one creditor is a good discharge to the extent of his apparent share: *Steeds* v. *Steeds* (10), unless

(1) (1846) 5 Hare, 542; (1847) 2 Ph. 354.
(2) (1834) 1 Bing. N. C. 198; 37 R. R. 75.
(3) [1895] 1 Ch. 236.
(4) [1901] 1 Ch. 261.
(5) (1840) 7 M. & W. 264.
(6) (1851) 10 C. B. 645.
(7) (1631) 1 Eq. C. Ab. 290.
(8) (1751) 2 Ves. Sen. 252, 258.
(9) (1798) 3 Ves. 628, 631; 4 R. R. 106.
(10) 22 Q. B. D. 537, 541.

the debtor has notice of a trust: *Webb* v. *Ledsam*. (1) The plaintiffs, who stand in the shoes of James Ingram, could not, therefore, recover more than 3000*l*. on the covenant, and are not entitled to hold their security for any greater amount.

*Butcher, K.C.*, and *H. E. Wright*, for the plaintiffs. The payment to the firm was not a valid payment of the separate debt due to James Ingram, unless he had given the firm authority to receive it on his behalf. No such authority ought to be implied in this case, as it would have been a breach of trust. The fact that James Ingram might have been liable with his other partners to account for the money is immaterial. There was no discharge of the separate debt. Assuming, however, that the payment was a payment to James Ingram, the defendant got no discharge for it. A joint mortgagee cannot give a valid receipt as to one moiety any more than a joint stockholder can transfer a moiety: *Barton* v. *North Staffordshire Ry. Co.* (2); *Sloman* v. *Bank of England*. (3) He could at most bind his actual beneficial interest, which in the present case was nil. Sect. 61 of the Conveyancing Act, 1881, does not enable a joint mortgagee to give a valid receipt during the lifetime of his co-mortgagee; and the fact that the payee happens to become the survivor in the joint account does not render the prior receipt valid.

Even if the debt is discharged at law, the estate is not discharged in equity; and the defendant can only redeem on the footing that 4000*l*. is due for principal: *Matson* v. *Dennis*. (4)

*Upjohn, K.C.*, in reply. In *Matson* v. *Dennis* (4), which was a vendor and purchaser case, the point as to survivorship did not arise, as it was possible on the evidence that the unpaid co-mortgagee was still alive, in which case the purchaser was no doubt entitled to his concurrence in the conveyance. The statement of Knight Bruce L.J. that "the whole 3000*l*. was not shewn to be discharged" implies that it was discharged as regards the share of the paid co-mortgagee.

*Cur. adv. vult.*

(1) (1855) 1 K. & J. 385.
(2) (1888) 38 Ch. D. 458, 465.
(3) (1845) 14 Sim. 475.
(4) 4 D. J. & S. 345, 350.

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May 13. FARWELL J. The plaintiffs stand in the same position as James Ingram, and the action must be regarded as an action by him. There are two questions involved—(1.) the liability under the covenant, which is a question of common law, and (2.) the liability in the foreclosure action, which is a question of equity. In my opinion, the old rule of common law, that payment to one of two joint creditors is a good discharge of the joint debt, still remains good. There was no possible conflict of any equitable rule with this, because no bill would lie in Chancery to recover a mere money demand. Equity, no doubt, had to deal with debts in the administration of the estates of deceased persons and in the liquidation of companies, but in determining whether claims for debts had been discharged or not equity followed the law, and indeed in cases of difficulty before the Chancery Procedure Act, 1852 (15 & 16 Vict. c. 86), ss. 61, 62, sent cases for the opinion of the common law Courts. There is nothing inconsistent with this in *Steeds* v. *Steeds*. (1) The question there was whether it was so clear that the debt claimed was joint that the defence should be struck out, and it was held that there was a conflict between law and equity as to the presumption to be drawn from the existence of a security to two without words of severance, and that the rule of equity as to such presumption now prevails. But this was a conflict of presumptions—whether there was or was not a joint tenancy, and had no relation to the legal consequences flowing from the existence of an admitted joint tenancy. In the present case both sides agree that this is a joint debt, and, having regard to the words of the covenant and the 61st section of the Conveyancing Act, 1881, I take this to be correct.

But the joint debt in this case was not paid to either of the joint creditors, but to the firm of which one of them was a member. Now, payment of a private debt due to a member of a firm to the firm of which the creditor is a member will not, in my opinion, support a plea of payment in the absence of evidence, express or implied, that the creditor has authorized the receipt of the money by the firm as his

(1) 22 Q. B. D. 537.

agents. The mere fact that the person who has made the payment would have a good cause of action against the firm to recover the money if the sum is not accepted in payment does not make it payment. The defendants to such an action must be all the partners, and there is no set-off either in law or in equity of the private debt of one defendant against the joint debt of the firm (see Lindley on Partnership, 5th ed. p. 292 (4), and cases cited there). It is, no doubt, generally true that a man may do by his agent anything that he can do himself, and I will assume that a joint creditor may effectually receive payment of a joint debt by his agent; and, in an ordinary case, I should infer agency from the receipt and expenditure of the money by the firm, and its entry in the firm's books; but there is great difficulty in coming to such a conclusion in the present case. If James Ingram did in fact authorize the firm to receive this money, he was guilty of a breach of trust; and the Court never infers that a man is guilty of a wrongful act unless the inference is irresistible. In the present case it is apparent from the admitted facts relating to James Ingram that he took very little part in the business of the firm after 1891. It is quite possible that he knew nothing whatever of the receipt of this money, and, although he would be liable jointly with his partners to refund it because he had had the benefit of it, as he must be taken to have known, it does not necessarily follow that he authorized the receipt. I do not think that I am bound, or indeed ought, to convict him of such a breach of trust. I do not, however, propose to rest my judgment solely on this ground.

The real contest between the parties has been as to the extent to which the property is charged. The plaintiffs argued that, even assuming that the 1000*l.* has been paid off, so that 3000*l.* only could be recovered under the covenant at law, nevertheless the defendant can only redeem on payment of the full 4000*l.* The defendant argued that the mortgage is merely a security for the debt covenanted to be paid, and that if, and so far as, the debt is gone, the mortgage must be diminished to the same extent, and, indeed, Stuart V.-C. decided the case of *Matson* v. *Dennis* (1) on this very ground.

(1) (1864) 12 W. R. 596.

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That was an objection to title between vendor and purchaser, and the Vice-Chancellor said that the purchaser was entitled to evidence that the joint debt was properly discharged; that a joint debt was properly discharged by payment to one joint creditor; that at law the receipt by one joint creditor was an extinction of the debt; and that no law was applicable but that of debtor and creditor; and he ordered the purchaser to pay his purchase-money into court, with costs. But his judgment did not meet with approval in the Court of Appeal. I have referred to the Vice-Chancellor's judgment because it shews that the very point now argued was raised and decided. Knight Bruce L.J. says (1): "The question is, whether when an equitable charge is vested in two persons—and as I will assume as joint tenants—the money can be paid to one without any special authority from the other so as to discharge the estate. I am not speaking of an action. I am speaking of discharging an equitable burden upon an estate, and so discharging the estate. In my judgment, and in the absence of special circumstances such as are not shewn to exist in the present case, that cannot be done. The purchaser is entitled to have it taken here, that Mr. M'Leay was alive at the time, and that some money has, without any consent on his part, been paid to the other joint tenant or tenant in common. That, I repeat, in my judgment, does not discharge the estate in equity. Especially in the case of vendor and purchaser I think the purchaser has a right to say that the whole 3000*l.* was not shewn to be discharged, but that it is consistent with the evidence to suppose that it may be still an available charge in equity." Turner L.J. shortly referred to the facts and concurred, adding that that part of the order under appeal which directed the payment of the purchase-money into court was right, and ought to stand, because the title was good and the question raised only one of conveyance. An order was made accordingly, by which the purchase-money was to be brought into court. No costs were given on either side, but the costs of the plaintiffs in the suit were directed to be costs in the cause. The reasoning of the Court of Appeal is directly contrary to the reasoning of Stuart V.-C. in the

(1) 4 D. J. & S. 350.

Court below. It was urged that this amounts only to an expression of opinion that the purchaser was entitled for his protection to have the concurrence of a possible claimant, but I cannot regard it as confined to this, and I am, of course, bound by the decision, and not the less because it coincides with my own opinion and the general practice of conveyancers, for, if the defendant is right, the joint account clause ought never to be inserted where the mortgage money is held on trust, and the existence of the trust ought always to be disclosed—a course which would revolutionize a settled and convenient practice of many years' standing.

The fallacy of the defendant's argument consists in the assumption that the question whether the money covenanted to be paid is recoverable at law is the only relevant consideration in foreclosure or redemption proceedings and in a disregard of the principles of equity that underlie foreclosure and redemption. The mortgagee's estate is absolute at law on breach of the covenant to pay on the appointed day, but the Court interferes for the benefit of the mortgagor on the terms that he does equity. The mere payment of the principal and interest legally recoverable is not necessarily sufficient. For example, money laid out in permanent improvements may have to be paid, although there is no covenant under which it could be recovered at law, and in a mortgage of a reversionary interest in land, where time runs from the falling into possession of such interest, foreclosure will be granted although the remedy on the covenant is statute-barred —*Hugill* v. *Wilkinson* (1)—and arrears of interest for more than six years may be retained in an action to redeem a mortgage of a reversion—*Dingle* v. *Coppen* (2)—and the mortgagee's right to tack and consolidate depends on the same principle. If a mortgagor chooses to pay otherwise than in strict accordance with the terms of his contract he does so at his own risk. The proviso for redemption in a mortgage to several is never expressed to take effect on payment to the mortgagees or either of them, but to the mortgagees or the survivor of them; and if a mortgagor pays to one, although such payment may be

(1) (1888) 38 Ch. D. 480. (2) [1899] 1 Ch. 726.

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a good discharge in law, yet the matter is at large when he comes into equity, and the Court takes into consideration all the facts of the case, and ascertains whether the payee was beneficially entitled to the whole or to a part only, or whether he was a trustee with the other mortgagee, and treats the payment as good in whole, or in part, or altogether bad accordingly. It is not a question of fixing the mortgagor with notice of a trust, but it is the inquiry that the Court makes to satisfy itself that it is just and equitable under all the circumstances to deprive the mortgagee of his legal title to the property comprised in the mortgage. This is an answer to the argument of the defendant—that James Ingram was the actual survivor, and therefore could have received the money and given a valid receipt at a later date. The mortgagor did not, in fact, pay to the survivor, but to one of two. He can rely only on the receipt as at the time when it was given, and he has only himself to thank because he chose to pay otherwise than in accordance with the contract. Indeed, on his own evidence he trusted to the firm of Ingram, Harrison & Ingram to do what was right with the money, and to indorse a receipt for the 1000*l.* on the mortgage. The judgment will be in the usual form settled in *Farrer* v. *Lacy, Hartland & Co.* (1), the principal sum due being 4000*l.*, not 3000*l.*

Solicitors: *Bowman & Curtis Hayward; George Guy Vertue, for Hodding & Co., Worksop, Notts.*

(1) (1885) 31 Ch. D. 42, 51.

G. R. A.

JOYCE J.
1901
*Feb.* 28;
*March* 16;
*April* 3.

## *In re* BILHAM.
## BUCHANAN *v.* HILL.

[1901 B. 241.]

*Will—Construction—"Surviving"—"Other"—Stirpital Survivorship.*

A testatrix gave one-third of the income of a fund to her daughter M. for life, and after her death one-third of the capital of the fund to all the children of M. whom she might leave surviving who should attain twenty-one in equal shares, and she made similar gifts of the other two-thirds to her daughters C. and E. and their children. And in case of the decease of any of her said three daughters without leaving lawful issue surviving who should attain twenty-one, the testatrix gave the income of the share of the fund thereby given to her said daughters so dying to her surviving daughters in like manner as the income thereinbefore given to them for their respective lives, and after their decease she gave the capital to the children of her said surviving daughters who should attain twenty-one per stirpes; and there was an ultimate gift over of the fund in case of the decease of all the daughters without either of them leaving lawful issue who should attain twenty-one. C. died first, leaving her surviving two children who attained twenty-one, but died in the lifetime of E., the last surviving daughter; M. died next, leaving her surviving two children who attained twenty-one and were still living. E. died last without leaving any issue her surviving. Upon the question who became entitled to E.'s share:—

*Held*, that, having regard to the ultimate gift over, the word "surviving" in the gift to the children of the testatrix's surviving daughters could not be read literally, but that it ought to be construed, not as "other," but as "surviving in stock," and that the children of M. were alone entitled to participate.

Dictum of Cotton L.J. in *Lucena* v. *Lucena*, (1877) 7 Ch. D. 255, 269, approved and followed.

*O'Brien* v. *O'Brien*, [1896] 2 I. R. 459, not followed.

ORIGINATING SUMMONS.

Frances Bilham, widow, by her will dated November 10, 1853, gave one-third part of the dividends and interest arising from stock in the public funds and of moneys which might belong to her at the time of her death, or which she might have power to dispose of, to her daughter Mary during her life for her separate use without power of anticipation; and after the death of her said daughter Mary the testatrix gave one-third of the

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capital stock and moneys amongst all and every the children of her said daughter Mary which she might leave her surviving who might then have attained or might thereafter live to attain the age of twenty-one years, equally, share and share alike, and if but one, then to such only child. The testatrix made a similar gift to her daughter Charlotte and her children, and also to her daughter Emily and her children. There followed a gift over in these terms: "And in case of the decease of any or either of my said three daughters without leaving any lawful issue them or her surviving who have then or may thereafter live to attain the age of twenty-one years Then I give the dividends and interest of the share of the said stock and moneys hereby given to my said daughters so dying unto my surviving daughters in like manner as the dividends and interest hereinbefore given to them for their respective lives And after their decease I give the capital stock and moneys aforesaid unto and amongst the children of my said surviving daughters who may then have attained or shall thereafter live to attain the age of twenty-one years such children taking amongst them the share in such stock and moneys only in which their parent had an interest." Then there was an ultimate gift over as follows: "And in case of the decease of all my said daughters without either of them leaving lawful issue who shall have attained or thereafter live to attain the age of twenty-one years Then my will is that my brother's children if any of them be then living or otherwise my next of kin shall have and take amongst them in equal shares all my capital stock in the funds and moneys aforesaid." The will also contained a residuary gift.

The testatrix died on December 23, 1857.

The testatrix's daughter Mary was once married, namely, to Thomas James Hill. She died on October 25, 1899, leaving her surviving two children, the defendants Thomas Bilham Hill and Ellen Mary Bilham Purdie, both of whom had attained the age of twenty-one. She had no other child who attained that age.

The testatrix's daughter Charlotte was once married, namely, to Peter Maclaurin. She died on January 1, 1888, leaving her surviving two children who attained the age of twenty-one,

namely, Thomas, who died on August 8, 1895, and Frances, who died on August 5, 1900. She had no other child who attained that age.

The testatrix's daughter Emily was once married, namely, to William Finch Hill. She was the last survivor of the testatrix's three daughters, and died on December 9, 1900, without leaving any issue her surviving. She had several children who died in her lifetime. None of them attained the age of twenty-one except one, Florence Beatrice Hill, who died on June 13, 1889.

This summons was taken out by the testatrix's personal representative, who was also interested under the residuary gift, to determine whether, upon the true construction of the will and in the events which had happened, the share of the stock and moneys given to the testatrix's daughter Emily for life passed under the residuary gift, or under the gift to the children of the testatrix's surviving daughters; and, if so, who were to be considered surviving daughters, and whether daughters' children who attained the age of twenty-one years, but died before the tenant for life, became entitled to participate in the distribution of the said share, or who were entitled to the said share.

*Borthwick,* for the summons. The word "surviving" in this will must have its proper meaning; Emily's share, therefore, falls into the residue. *In re Benn* (1) is like this case, except that there there was no gift over. That, no doubt, is an important distinction, but to construe "surviving" as "other" in the gift to the children of the surviving daughters involves construing "surviving" in two different senses in the same will. That word must have the same meaning throughout the will.

*Crossfield,* for Thomas Bilham Hill. "Surviving" may mean surviving in person, which is its natural meaning, or surviving in stock. Having regard to the gift over, surviving cannot bear its natural meaning, and must here mean surviving in stock; and this share, therefore, goes to the children of the

(1) (1885) 29 Ch. D. 839.

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testatrix's daughter Mary. [He cited *In re Keep's Will* (1); *Waite* v. *Littlewood* (2); *Wake* v. *Varah* (3); *Lucena* v. *Lucena* (4); *In re Bowman.* (5)]

*Howard Wright*, for Ellen Mary Bilham Purdie, adopted the foregoing argument.

*A. Whitaker*, for the personal representatives of the children of Charlotte. In this will "surviving daughters" ought to be construed as "other daughters." The inference from the gift over, which is to take effect in case of the decease of all the daughters of the testatrix, is that she intended the fund to vest in somebody on the non-happening of that event; but if the children of Mary had died before the death of the last surviving daughter, upon the construction contended for by Mr. Crossfield, there would have been no one in whom the fund could have vested. This difficulty can be removed by construing "surviving" as "other." There is no sound reason for the doctrine of stirpital survivorship. It was not known to the English Courts prior to *Waite* v. *Littlewood* (2), which contains a dictum of Lord Selborne in favour of it. That dictum has since received some support from the case of *Lucena* v. *Lucena* (4); but there has been no decision in the English Courts upon the point, and there is a direct decision of the Court of Appeal in Ireland (affirming the decision of the Court of first instance) that effect ought not to be given to this doctrine, and that in a case like this "surviving" ought to be construed as "other": *O'Brien* v. *O'Brien.* (6) There the dicta of Lord Selborne in *Waite* v. *Littlewood* (2), and of Cotton L.J. in *Lucena* v. *Lucena* (4), which were obiter only, were expressly disapproved. That decision is on all-fours with the present case, and ought to be followed. Theobald on Wills, 5th ed. p. 601, lays down the law in the same way. The result is that all the children who survive their parents and attain twenty-one are entitled to participate, whether they survive the period of accruer or not, and the fund is divisible between the families of Mary and Charlotte.

*Bovill*, for the personal representatives of Florence Beatrice

(1) (1863) 32 Beav. 122.
(2) (1872) L. R. 8 Ch. 70.
(3) (1876) 2 Ch. D. 348.
(4) 7 Ch. D. 255.
(5) (1889) 41 Ch. D. 525.
(6) [1896] 2 I. R. 459.

Hill, contended that she was entitled to participate in her mother's share.

*Borthwick*, in reply.

*Cur. adv. vult.*

April 3. JOYCE J. In this case the testatrix gave one-third of the income of a money fund to her daughter Mary for her life, and after her death one-third of the capital to the children of such daughter whom she might leave her surviving, and having attained or who should attain twenty-one, share and share alike. The testatrix made a similar gift to her daughter Charlotte and her children, and also to her daughter Emily and her children. There followed a gift over in these terms: [His Lordship then read the gift over and also the ultimate gift over, and continued as follows:—]

In other words, we have a settlement of a third share upon each of the daughters and her children, with a gift over of the share of such of them as may die in a certain contingency, namely, without leaving issue her surviving who attained twenty-one, unto the testatrix's surviving daughters, practically in the same manner as their original shares, with an ultimate gift over to third persons to take effect in the contingency of all the testatrix's said daughters dying without leaving issue who attained twenty-one.

Now, whatever the effect might have been of this will in the absence of the ultimate gift over (see *In re Benn* (1)), each share given over being practically directed to be held upon the same trusts as an original share (see the concluding part of Kay J.'s judgment in *In re Bowman* (2)), it is clear, I think, having regard if necessary to the ultimate gift, that the word "surviving" with respect to daughters in the gift over cannot be read in its literal or natural sense: *Waite* v. *Littlewood* (3), as explained by Cotton L.J. in *In re Benn* (4); *Wake* v. *Varah* (5); but, the shares being all settled, the actual decision of the Court of Appeal in *Lucena* v. *Lucena* (6) does not apply.

(1) 29 Ch. D. 839.
(2) 41 Ch. D. 532.
(3) L. R. 8 Ch. 70.
(4) 29 Ch. D. 845.
(5) 2 Ch. D. 348.
(6) 7 Ch. D. 255.

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The testatrix's daughter Charlotte died first, namely, in 1888, leaving two children who attained twenty-one, but both of them died before the month of December, 1900, at which date there was no issue living of Charlotte. The testatrix's daughter Mary died in the year 1899, leaving two children, both of whom are still living and are defendants. The testatrix's daughter Emily died last of all, in the month of December, 1900, without leaving any issue her surviving, although she had had issue (among other children) a daughter, Florence, who attained twenty-one, and died a spinster in the year 1889.

The question to be determined is who, upon the death of Emily, became entitled to her share. There was no actually surviving daughter of the testatrix at that time, and the only one who survived by her children or issue was Mary. The case is precisely that put by Cotton L.J. in giving judgment in *Lucena* v. *Lucena* (1), where he says: "The fact of shares being settled, and the fact of the ultimate gift over being only to arise in the event of a failure of all children and issue who are objects of the testator's bounty, are circumstances each of which may properly be relied upon as shewing that 'survivors' is not to receive its strict construction. Each of these circumstances exists in the present case. If, with the gift over standing as it does, there had been no settlement of the daughters' shares, we are of opinion that the word 'surviving' would not have received its strict construction, and must have been construed 'other'; and our opinion is that the circumstance of the shares of some of the children named in the will being settled is not sufficient to give to the word 'surviving,' as a matter of construction, the meaning of 'survivors' in person or in issue taking an interest under the will, though that would have been the effect of the gift to survivors if the shares of all the children, and not of some only, had been settled."

Under the circumstances of the present case it is, I think, immaterial whether the survivorship be by children or issue. Mr. Whitaker in his able argument claimed for the representatives of the children of Charlotte who attained twenty-one

(1) 7 Ch. D. 269, 270.

that they ought to participate. But the issue of Charlotte did not survive Emily any more than Emily's daughter Florence did, and it would, in my opinion, be a strange result to admit the deceased children of Charlotte while excluding Florence, the child of Emily.

The decision of the Irish Court in the case of *O'Brien* v. *O'Brien* (1) was very properly pressed upon me. I have read more than once the voluminous judgments in that case. They contain many passages the reasoning of which I am unable to follow, and with other passages I cannot agree. The truth is that in many cases where the word "surviving" is reported to have been read as "other," all the stocks were in fact surviving, and it was, I think, really upon that ground that the Court decided as it did. At all events, I prefer the reasoning of Lord Selborne in *Waite* v. *Littlewood* (2), and of the judges who decided *Wake* v. *Varah* (3), and of the Master of the Rolls and Cotton L.J. in *Lucena* v. *Lucena* (4); and accordingly I decide this case in accordance with the opinion of Cotton L.J., as expressed in the passage which I have quoted from his judgment in *Lucena* v. *Lucena*. (4) This recognises the idea of survivorship in the use by the testatrix of the term "surviving daughters," and does less violence to the words she has used than I should do if I followed *O'Brien* v. *O'Brien* (1), and read "surviving" merely as "other" without considering whether the other daughters did or did not survive in any sense of the word.

The result is that, in my judgment, the children of Mary are alone entitled to the one-third of which Emily received the income during her life.

Solicitors: *Routh, Stacey & Castle*; *C. G. Hobbs*; *C. W. Hird.*

(1) [1896] 2 I. R. 459.
(2) L. R. 8 Ch. 70.
(3) 2 Ch. D. 348.
(4) 7 Ch. D. 255.

H. B. H.

JOYCE J.
1901
*April* 3, 29.

## *In re* PARSON.
## PARSON *v.* PARSON.

[1885 P. 2917.]

*Practice—Costs—Taxation—Party and Party—Special Fee to Counsel—Disallowance.*

A "special" fee to leading counsel was disallowed on taxation as between party and party, although, owing to previous retainer by other parties, the services of a leader practising in the particular Court could not be obtained by the party whose costs formed the subject of the taxation.

This was an action commenced in 1885 for the administration of the estate of the testator.

In 1900 James Ward Burchell brought in a claim to prove against the estate as mortgagee, notwithstanding that the time for the admission of proofs had expired. This claim came before Kekewich J. upon a summons which was adjourned into Court. The claim was resisted by the plaintiffs and other parties to the action, all of whom were represented at the hearing both by leading and junior counsel. The claimant failed to obtain the services of any of the leaders practising in the Court of Kekewich J., all of them having been retained by opposing parties; and several leaders in other Courts, to whom he also applied, declined to accept a brief except at a special fee. Under these circumstances he retained the services of a special leading counsel, the fees marked upon the brief being ten guineas with a special fee of fifty guineas. The result of the application was that the claimant was admitted to prove for a portion of his claim, and an order was made in his favour to that extent with costs to be taxed.

The claimant's bill of costs contained an item of 66*l.* 2*s.* 6*d.* in respect of fees paid to the leading counsel upon the summons, and an item of 5*l.* 10*s.* in respect of the fees paid to the junior counsel upon the same application.

On taxation the plaintiffs objected to the item of 66*l.* 2*s.* 6*d.* on the ground that the fees were excessive, having regard to the nature of the application. The taxing master in his

answer to the objections stated as follows: "Objection 10. The claimant was obliged to brief a leader from another Court, all the leaders in Kekewich J.'s Court having been retained by other parties in these proceedings. He had, therefore, to pay a larger fee to such counsel than would otherwise have been necessary. This fee I have reduced by the sum of ten guineas. I consider in my discretion that under these circumstances the fee allowed is reasonable and proper."

This was a summons by the plaintiffs to review the taxation, asking that the objections might be allowed, and that the matter might be referred to the taxing master to vary his certificate accordingly.

*Hughes, K.C.*, and *Henry Fellows*, for the plaintiffs. Under the circumstances of this case the retention of a special leading counsel at a fee of sixty guineas was a luxury which the claimant was not entitled to throw upon his opponents: *In re The Warkworth*. (1) It is suggested in the answer to the objections that all the leading counsel practising in the Court were retained, but the services of other leaders might have been obtained at an ordinary fee. The reduction made by the taxing master does not make the fee reasonable having regard to the fees paid to the junior counsel, and to the other leaders engaged in the case. The taxing master has taken a wrong view. The only question is whether the special fee of fifty guineas can be allowed in this case. There is no case in which a special fee has been allowed against the defeated party. At any rate, in this case there was no such necessity to employ special leading counsel as to justify throwing this very heavy fee upon the plaintiffs.

*In re Harrison* (2) was a case of taxation between solicitor and client. There it was held that, notwithstanding Order LXV., r. 27 (48), authority might be given by the client to the solicitor to employ a particular leader and give him such special fees by way of refresher or otherwise as might be necessary to secure his services; but those fees would not have been allowed on taxation between party and party. It is expressly provided by

(1) (1885) 1 Times L. R. 659.
(2) (1886) 33 Ch. D. 52.

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the rules that no retaining fees shall be allowed on taxation between party and party: Rules of the Supreme Court, 1883, Order LXV., r. 27 (44).

The allowance of a special fee on party and party taxation is not justified by any authority or practice.

*Younger, K.C.*, and *W. E. Vernon*, for J. W. Burchell. This is not a case in which the Court will interfere with the exercise of the taxing master's discretion, he having considered the special circumstances of the case, and come to the conclusion that the fee which he has allowed is reasonable and proper. For the purpose of resisting the claim all the other parties thought it necessary to brief leading counsel. Mr. Burchell endeavoured to obtain the services of a leader attached to the Court, but having failed to do so, and having failed also to obtain a leader practising in any of the other Courts without paying a special fee, he was compelled on the eve of the hearing to brief a special leader, with whose assistance he succeeded in his application.

The question to be considered is whether the taxing master has made a gross mistake. His decision as to the amount of counsel's fees will not be interfered with unless he has done so: *Brown* v. *Sewell.* (1) There has been no such mistake here.

There is no rule to the effect that a special fee to counsel cannot be allowed on taxation between party and party. In *Smith* v. *Earl of Effingham* (2) Lord Langdale M.R. said: "Parties have a right to be heard by any counsel they think proper to retain, and, in a case like the present, where they are to receive costs from the adverse party, they ought to be allowed such necessary and proper fees as they have paid for the counsel they have employed." It is true that in that case a special retainer to counsel was disallowed on taxation as between party and party; but it is to be inferred from the judgment of the Master of the Rolls that, in a case where, apart from the indulgence of luxury or caprice, a party has of necessity been compelled to pay a special fee, such fee would not be disallowed even on taxation between party and party.

(1) (1880) 16 Ch. D. 517. (2) (1847) 10 Beav. 378, 385.

In *Nichols* v. *Haslam* (1) it was held that, in taxing the costs of a suit which were to be paid by the defendant, a special retainer paid by the plaintiff to the Attorney-General ought to be allowed, although there were no special circumstances which rendered the employment of the Attorney-General necessary.

*Hughes, K.C.*, in reply. The decision in *Nichols* v. *Haslam* (1) cannot be supported. *Smith* v. *Earl of Effingham* (2) is in favour of the plaintiffs' contention. A special fee is not paid in respect of the work done. The measure of the proper remuneration for the work done is the fee on the brief, which is altogether independent of the special fee paid by way of retainer. The sole question is whether this special fee of fifty guineas ought to be allowed as between party and party. The taxing master has proceeded on a wrong footing, and his taxation ought to be reviewed.

*Cur. adv. vult.*

April 29. JOYCE J. This is an application to review a taxation under an order in an administration action which has been going on for many years, and in which I was counsel for one of the parties. Under the circumstances I more than once declined to hear this application, but being informally urged to do so because of certain inconveniences which would otherwise have been occasioned, I consented to take it; but I find it difficult to divest myself of the knowledge which I have of the proceedings and of the particular application upon which the order was made under which the taxation has taken place. The taxation is not one between solicitor and client, and the sole question in dispute is as to the fees of a leading counsel within the bar upon the hearing of a summons which was adjourned into Court. It was not like a trial with witnesses in the examination and cross-examination of whom counsel of great experience or discretion might have been required; but all the evidence was by affidavit or documentary.

The fee in question is sixty guineas, made up, as clearly appears by the indorsement upon the brief produced before me, of ten guineas, the fee on the brief, and fifty guineas special

(1) (1845) 15 Sim. 49. (2) 10 Beav. 378, 385.

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fee, the leading counsel instructed being one of those who do not accept a brief in any Court without an additional special fee of fifty guineas. The taxing master's answer to the objections is in the following terms: [His Lordship read the answer, and continued:—]

This, in my opinion, was not an admissible course for the taxing master to adopt under the circumstances; but even if it were, the proper fee to be allowed would be seven guineas and no more, the fee paid to the junior counsel being only five guineas.

I consider that in the present case a fee of fifty guineas upon the brief of the leading counsel, whether practising within or without the bar, would be grossly exorbitant and unjustifiable. The only question really is whether this special fee of fifty guineas is to be allowed upon such a taxation; and it is, I think, enough for me to say that, even if such a special fee could ever be allowed—and as at present advised I think it could not—there were not, in my opinion, any special circumstances sufficient to warrant the allowance in the present case. Consequently I decline to allow this special fee, and the fees charged must be reduced by the amount, namely, fifty guineas.

Solicitors: *Burchell, Wilde & Co.; Burchells & Co.*

G. A. S.

## *In re* AMALGAMATED SYNDICATES, LIMITED.

WRIGHT J.

1901

*April* 2, 17; *May* 8.

[00248 of 1897.]

*Company—Winding-up (Voluntary)—Remuneration of Liquidator—Charges for Letters.*

A company which was being wound up under a compulsory winding-up order was liable for the costs and expenses of the voluntary winding-up of other companies, the undertakings of which it had purchased.

In assessing the amount payable as remuneration to the voluntary liquidator:—

*Held*, (1.) that the Court would not sanction an alleged practice of accountants to charge for all letters written, irrespective of their character, as having taken half an hour of the principal's time (charged for at a certain rate) in the preparation; (2.) that there was nothing to bind the Court to apply the scale adopted by the Chancery judges and sanctioned by the Lord Chancellor in 1868, which only applied to official liquidators; and (3.) that each case as to the remuneration of a voluntary liquidator must be considered with regard to its own particular circumstances.

SHORTLY after the formation of the Diamond Jubilee Syndicate, Limited, the Diamond Jubilee Syndicate, No. 2, Limited, and the Diamond Jubilee Contract Corporation, Limited, the assets of the three companies were transferred to the Amalgamated Syndicates, Limited, and by the purchase agreements the Amalgamated Syndicates agreed to pay the costs, charges, and expenses of the voluntary winding-up of the vendor companies. The three vendor companies afterwards went into voluntary winding-up, S. G. Cole being appointed the voluntary liquidator in each case, and a compulsory winding-up order was made against the purchasing syndicate, the official receiver becoming its liquidator. It was not disputed that the official receiver was liable to pay the remuneration of the voluntary liquidator, but a question arose as to what basis the remuneration should be calculated upon, and the official receiver, as liquidator of the purchasing syndicate, took out a summons in the winding-up of that syndicate, asking for an order that Cole, voluntary liquidator of the three vendor companies, should forthwith deliver his account as voluntary liquidator and pay

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to the applicant any balance in his hands after deduction of such sum for remuneration as the Court might think fit and proper. A sum of 425*l.* had been paid in settlement of a prior claim by Cole for remuneration, and he now claimed, in respect of subsequent work as liquidator, 328*l.* 7*s.* 7*d.* The amount was arrived at according to the time occupied or estimated to be occupied by Cole and his clerks in the work of the voluntary liquidations. The time of the liquidator was charged for at the rate of 3*l.* 3*s.* a day; that of first-class clerks at 1*l.* 11*s.* 6*d.* a day; and that of other clerks at 1*l.* 1*s.* a day. A considerable part of the sum claimed was charged in respect of writing letters, which were charged for as having taken half an hour each to write. This method of charging was alleged to be in accordance with the usual practice of accountants; but the official receiver contended that this method of computation was incorrect, as many of the letters were either short or in the nature of circulars, and were such as could be written by any ordinary clerk. The registrar had suggested 150*l.* as sufficient remuneration, and thereupon the summons was adjourned to the judge in court, and was heard by Wright J. on April 2 and 17, 1901.

*M. Shearman*, for the official receiver and liquidator of the Amalgamated Syndicates, Limited. The only duty of the respondent was to get in the assets of the three companies of which he was the voluntary liquidator, and on the assets being got in they became the property of the new company and he had nothing more to do with them.

With what he has been already paid and the amount allowed by the registrar, the respondent will have been amply recompensed for his services.

The Court ought not to sanction payment under a system which allows each letter to be charged for as if it had taken half an hour of the principal's time.

Many of the letters were of a character which would not overtax the abilities of a second or third class clerk.

*Stewart-Smith*, for the voluntary liquidator of the other companies. The respondent remained liquidator of the three

selling companies notwithstanding the purchasing syndicate had been ordered to be wound up, and his position and duties were not affected by the winding-up order.

The rate of charging for letters is not unreasonable, and is in accordance with the practice of accountants. The charges by the day are not unreasonable having regard to the work done and the regulation and scale adopted by the Chancery judges and sanctioned by the Lord Chancellor in 1868. (1) [He also referred to *In re Vimbos, Limited* (2), on the point whether the Court had jurisdiction on this application to make any order; but by consent of the parties the point was not pressed.]

*Cur. adv. vult.*

May 8. WRIGHT J. In this case I do not see my way to increasing the remuneration as allowed by the registrar. The voluntary liquidator has already been paid 425*l.* in respect of his remuneration, and the registrar has now allowed him a further sum of 150*l.* The only question is whether that is or is not enough. I think it is abundantly enough. If I had been asked to reduce it, it is possible that I might have done so, but no such reduction is asked for. An attempt has been made to shew that it is the general practice to allow half an hour of the principal's time for each letter written. That seems to me to be quite wrong, and it is not established that there is any such general practice as to the charges allowed to be made by accountants. The Court should not adopt a practice which makes no discrimination between the class of letter which from its importance requires real attention on the part of the principal, and letters which do not call for that attention. Solicitors do not charge for letters upon that principle. I think the applicant was mainly influenced by the scale adopted by the Master of the Rolls and the Vice-Chancellors and sanctioned by the Lord Chancellor in 1868; but that scale was applicable only to official liquidators. There is nothing that binds me to apply it. In the case of a voluntary liquidator each case must be considered with regard to its own particular

(1) L. R. 3 Ch. lxiv. (2) [1900] 1 Ch. 470.

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circumstances. In the present case I think the sum proposed by the registrar is sufficient.

Solicitors for official receiver: *W. H. Smith & Son.*

Solicitors for voluntary liquidator: *J. Vernon, Son & Stephen.*

F. E.

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WRIGHT J. 1901 *May* 15.

## *In re* CRICHTON'S OIL COMPANY.

[0098 of 1901.]

*Company—Winding-up—Surplus Assets—Preference Shares—Revenue representing Dividends never Declared—Loss of Capital.*

The memorandum of association of a company divided its capital into preference and ordinary shares, and provided that the former should confer on the holders the right to a fixed accumulative preferential dividend at the rate of 5*l.* per cent. per annum on the capital paid up thereon, "subject to the provisions of the company's articles of association." The articles of association provided (6) that the holders of the preference shares for the time being should be entitled to a cumulative preferential dividend at the rate of 5*l.* per cent. per annum payable half-yearly on certain named days, provided that in the event of winding-up the surplus assets should be distributed between the holders of preference and ordinary shares according to the amount paid up thereon; (103) that the directors should have power to set aside out of the profits of the company or otherwise such sums as they thought proper as a reserve fund to meet contingencies, equalizing dividends, &c., and for such other purposes as the directors should in their absolute discretion think conducive to the interests of the company; (108) that profits from time to time available for dividends should, subject to the provisions thereinafter contained, be applicable first to the payment of the fixed cumulative preferential dividend on the preference shares, and that the surplus should be applicable to the payment of dividends on the ordinary shares, but that the whole or any part thereof might be carried to reserve; (110) that the company in general meeting might declare a dividend; but (111) that no larger dividend should be declared than was recommended by the directors.

All the preference and ordinary shares which were issued were fully paid up. The preferential dividend was paid up to February, 1896, only.

In March, 1899, there was a debit balance on profit and loss account of 4346*l.*, as appeared by that account and the balance-sheet of that date (the last of the accounts and balance-sheets made out before the winding-up of the company commenced).

In July, 1900, the company passed resolutions—(*a*) sanctioning an agreement for the sale to another company of all the company's assets except

any "undivided net profits of the business of the vendor company appearing in the balance-sheet for the year ending March 31, 1900," which was to be settled and audited by the auditors of the vendor company on the same basis as the previous balance-sheets; (*b*) for the voluntary winding-up of the company.

On August 7, 1900, the auditors certified a profit and loss account and balance-sheet shewing a profit of 1675*l.* on the trading for the year ending March 31, 1900, and on the following day resolution (*b*) was confirmed as a special resolution.

The amount produced by the sale was insufficient to repay to the shareholders the amount of capital paid up on the shares. The preference shareholders claimed that the 1675*l.* should be utilized in paying a dividend on their shares as from February, 1896. The ordinary shareholders contended that the amount must be applied towards repaying the holders of preference and ordinary shares the capital paid up thereon:—

*Held*, (1.) that there was no rule of law that profit on one year's trading could not be divided merely because on the profit and loss account there was a debit balance on the trading of former years; but (2.) that it was not sufficient to support the claim of the preference shareholders to shew that the profit might have been made available for dividend by some action of the directors, and that, as it had not been shewn that the profit had actually been made so available, the claim of the preference shareholders failed.

Observations on *In re Odessa Waterworks Co.*, W. N. (1897) 166 (more fully reported in a note to this report, post, p. 190).

CRICHTON'S OIL COMPANY, LIMITED, was registered under the Companies Act, 1862 to 1886, on March 21, 1889, and clause 5 of its memorandum of association was as follows: "The capital of the company is 40,000*l.*, divided into 400 preference shares of 10*l.* each and 3600 ordinary shares of 10*l.* each. The said preference shares shall confer on the holders the right to a fixed accumulative preferential dividend at the rate of 5*l.* per cent. per annum on the capital paid up thereon, subject to the provisions of the company's articles of association; and any new capital may be issued with any preferential, deferred, or special rights and privileges which may be assigned thereto, by or in accordance with the regulations of the company for the time being."

Clause 6 of the articles of association provided—(*a*) that the holders of the preference shares for the time being should "be entitled to a cumulative preferential dividend at the rate of 5*l.* per centum per annum, payable half-yearly, on the 1st of September and the 1st of March: (*b*) Provided always that, in

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the event of the winding-up of the company, the surplus assets shall be distributed between the holders of preference shares and ordinary shares, according to the amount paid up thereon."

The articles of association further provided as follows: "103. . . . The directors shall be entrusted with the following powers, namely, power . . . . (14) from time to time to set aside out of the profits of the company, or otherwise, such sums as they think proper as a reserve fund to meet contingencies, or for equalizing dividends, or for repairing, improving, and maintaining any of the property of the company, for redeeming debenture stock, and for such other purposes as the directors shall in their absolute discretion think conducive to the interests of the company, and to invest the several sums so set aside upon such investments as they think fit, subject to clause 4 hereof" (forbidding the purchase by the company of its own shares), "and from time to time deal with and vary such investments, and dispose of all or any part thereof for the benefit of the company, and to divide the reserve fund into such special funds as they think fit, with full power to employ the assets for the time being constituting the reserve fund in the business of the company, and that without being obliged to keep the same separate from the other assets of the company. But so much only of the reserve fund as represents profits shall be applicable to the payment of dividends."

"108. The profits of the company from time to time available for dividends shall, subject to the provisions hereinafter contained, be applicable: First, to the payment of the fixed cumulative preferential dividend on the preference shares in the original capital. Secondly, the surplus shall be applicable to the payment of dividends on the other shares in proportion to the capital paid up thereon, but the whole or any part thereof may be carried to reserve or otherwise dealt with, as the directors with the sanction of the company in general meeting may from time to time determine."

"110. The company in general meeting may declare a dividend to be paid to the members according to their rights and interests in the profits, and may fix the time for payment.

"111. No larger dividend shall be declared than is recommended by the directors, but the company in general meeting may declare a smaller dividend.

"112. No dividend shall be payable except out of the profits arising from the business of the company. . . .

"113. The directors may from time to time pay such monthly or interim dividends as in their judgment the position of the company justifies. . . . "

"139. If the company shall be wound up, and the surplus assets shall be insufficient to repay the whole of the paid-up capital, such surplus assets shall, subject to clause 6, s. (*b*), be distributed so that as nearly as may be the losses shall be borne by contributories in proportion to the capital paid up or which ought to have been paid up on the shares in respect of which they are contributories at the commencement of the winding-up. But this claim is to be without prejudice to the rights of the holders of shares issued upon special conditions."

All the preference shares and 1804 of the ordinary were issued and were fully paid up. The dividends on the preference shares were paid up to February 28, 1896, only.

On March 31, 1899, there was a debit balance on profit and loss account of 4346*l.* 3*s.*, as appeared by the profit and loss account and balance-sheet of that date. This was the last balance-sheet made out before the company went into voluntary liquidation, and it and the profit and loss account were unanimously adopted at the ordinary general meeting held on August 9, 1899.

At an extraordinary meeting held on June 7, 1900, the shareholders were informed that negotiations had taken place as to a sale of the company's assets, and a resolution was passed "that the board be authorized to realize the whole of the assets of the company on the basis of a payment to each of the shareholders, preference and ordinary, of a sum equal to 7*l.* per share." This resolution was subsequently confirmed.

An arrangement was accordingly entered into, through the solicitors of the company, the terms of which were embodied in the draft of an agreement between the company and a trustee on behalf of another company intended to be formed, providing

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that the company should sell to the intended company all its undertaking and assets "as of the 31st March–1st April, 1900, except" (amongst other things) "any undivided net profits of the business of the vendor company appearing in the balance-sheet for the year ending March 31, 1900." The amount of the net profits was not stated, but the draft agreement provided as follows: "The purchasing company shall be entitled to receive, get in, and collect the net profits," and other things, "excepted as aforesaid out of the sale, and shall (as soon as conveniently may be after the balance-sheet of the vendor company as at the 31st March, 1900, shall have been finally settled and audited on the same basis as the previous balance-sheets by Messrs. Monkhouse, Goddard & Co.)"—the auditors of the vendor company—"return to the vendor company, as representing and in lieu of the said excepted profits, such sum as shall appear by such certified and audited balance-sheet to be the amount of the aforesaid undivided net profits of the vendor company." The draft further provided that the consideration for the sale should be the sum of 15,428*l.*, or such less sum as should "appear by the balance-sheet of the vendor company as of the 31st March, 1900, when settled and audited as aforesaid, to be the net value of the property and assets of the vendor company after deducting therefrom the liabilities of the vendor company and any undivided net profits of the business of the vendor company appearing upon the balance-sheet for the year ending the 31st March, 1900," but adding thereto a sum of 334*l.* 3*s.*

On July 23, 1900, the shareholders of the vendor company passed resolutions that the agreement (then unexecuted) should be confirmed, and that the common seal of the company should be affixed thereto; and at a second meeting held on the same day the company passed a resolution for voluntary winding-up. The agreement was executed on August 3, 1900. A further profit and loss account and balance-sheet were prepared by the auditors and certified by them on August 7, 1900. This profit and loss account shewed the profit on the year ending March 31, 1900, to be the sum of 1675*l.* 6*s.* 11*d.* The same amount was shewn on the credit side of the balance-sheet,

and was there deducted from the loss of 4346*l.* 3*s.* above mentioned.

The resolution for voluntary winding-up was confirmed as a special resolution on August 8, 1900.

The purchase having been completed, a claim was made on behalf of a preference shareholder that the sum of profit, 1675*l.* 6*s.* 11*d.*, should be utilized in paying a dividend on the preference shares as from February 28, 1896.

The liquidators took out an originating summons in the voluntary winding-up for the determination of the question whether the sum of 1675*l.* 6*s.* 11*d.*, being the amount of the profit appearing by the books to have been made by the company on its trading for the year ending March 31, 1900, or any and what part of such sum ought (notwithstanding the previously existing debit to profit and loss) to be distributed in the liquidation as dividend among the holders of the preference shares, or how otherwise such sum ought to be dealt with.

Persons having been appointed to represent the two classes of shareholders, the summons was adjourned into Court and heard before Wright J. on May 15, 1901.

*Kirby*, for the liquidators, stated the facts and the questions involved, and referred to *In re Bridgewater Navigation Co.* (1) and *Bishop* v. *Smyrna and Cassaba Ry. Co.* (2)

*Dunham*, for the preference shareholders. The 1675*l.* 6*s.* 11*d.* was profit arising on a year's trading, and might have been applied in payment of dividends while the company was a going concern, although the then existing amount of capital which had been lost had not been recouped: *In re National Bank of Wales.* (3) The sum is therefore applicable, in the first instance, under art. 108, to the payment of the dividend on the preference shares, and, as the dividend is cumulative, it must be paid as from the date when the last dividend was paid to the preference shareholders.

The money must be dealt with as if the company were a going concern. The other assets have been sold, but the

(1) [1891] 2 Ch. 317. (2) [1895] 2 Ch. 265.
(3) [1899] 2 Ch. 629.

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agreement expressly excepts the net profits, the obvious intention being that the sum should be dealt with as if no winding-up was in view—that is to say, according to the constitution of the company. There would have been no reason for keeping the amount of net profits separate from the other assets if all the assets were to be divided equally among the preference and ordinary shareholders. Under the memorandum and articles of association the preference shareholders are entitled to be paid a cumulative dividend out of profits before the ordinary shareholders take any part of the profits, and the fact that winding-up has taken place before the profits are divided does not affect their rights: *Bishop* v. *Smyrna and Cassaba Ry. Co.* (1)

*Cassel*, for the ordinary shareholders. Having regard to the provisions of the memorandum and articles of association, nothing can be distributed as profit applicable as dividend, because no declaration of a dividend has been made under art. 110, and it is now too late, winding-up having commenced, to make the declaration: *In re Odessa Waterworks Co.* (2) In

(1) [1895] 2 Ch. 265, 272.

(2) W. N. (1897) 166. The following is a fuller report ot the same case from a manuscript note of the reporter:—

Byrne J. Nov. 25, 1897.

*In re* ODESSA WATERWORKS COMPANY, LIMITED.

THIS was an application to ascertain how the surplus assets (after payment of debts) amounting to about 220,000*l.* were to be dealt with in the winding-up.

The company was incorporated in March, 1872.

Clause 5 of the memorandum of association was as follows: "The nominal capital of the company is 850,000*l.*, divided into 42,500 shares of 20*l.*, of which 30,000 will be issued as preference shares."

Material articles of association:—

"101. The directors may, with the sanction of the company at the ordinary general meeting, declare a dividend to be paid to the members in proportion to their shares, subject, however, to the provision contained in art. 105 of these presents, and in the next succeeding article.

"102. No dividend shall, however, be declared to be paid to the proprietors of B deferred shares, unless and until the net profits of the company for the current year shall have enabled the directors to declare and pay to the proprietors of A preferred shares a preferential dividend after the rate of 6*l.* per cent. per annum for that year. And after the proprietors of B deferred shares shall have been paid a dividend equal to 6*l.* per cent. per annum for the same current year, the residue, if any, shall, subject to the provisions contained in

that case Byrne J. distinguished *Bishop* v. *Smyrna and Cassaba Ry. Co.* (1) because in the latter, under the memorandum art. 105, be equally divided between both classes of shareholders, pari passu, in proportion to the amounts called and paid upon their respective shares.

"103. They may also, as and where they think fit, pay to the members half-yearly, an interim dividend in advance or on account of any yearly dividend estimated by them to be payable to the shareholders in respect of the net profits of the company during that current year, subject, however, to the provisions hereinafter contained with respect to the reserve and contingent funds respectively.

"104. No dividend shall be declared or payable except out of the profits arising from the business of the company, and no unpaid dividend or interest shall ever bear interest as against the company.

"105. The directors may set aside out of the profits or receipts of the company such sum as they may think proper to a fund to form a 'sinking fund' for the redemption of capital, or to a fund to be called 'The Contingency Fund,' for the purpose of meeting any unforeseen or prospective liabilities, and may further out of the said profits set aside such sum as they may think proper as a reserve fund for equalizing dividends, or for any other purposes of the company; and the directors may invest the sums so set apart upon such securities as they may select, except in the purchase of the shares of the company."

The articles were silent as to the mode of distribution of surplus assets on winding-up.

All the 30,000 preference shares, and 12,472 deferred shares were issued —all being fully paid

| | |
|---|---|
| (30,000 | |
| 12,472 | |
| 42,472 | |
| 20 | |
| £849,440 | issue of fully-paid capital). |

The works were constructed and business was carried on by the company. The outlay on works was large, and no dividends were ever paid on deferred shares. The following dividends were paid on preference shares:—

| | |
|---|---|
| In 1875, | 1 per cent. (in deferred dividend warrants). |
| „ 1887, „ 1889, „ 1893 | 1 per cent. in cash in each of these years. |
| „ 1894 | 1½ per cent. in cash. |

* It was alleged that in each of several years prior to and in 1894 there were considerable balances of revenue over expenditure, not representing cash in hand, but being a fund out of which, if made good, a dividend might lawfully have been declared and paid—not enough in any year to pay a full 6 per cent. dividend on the preference shares, but enough in each year to have paid a very considerable proportion of that amount. At the ordinary meeting of the company on April 25, 1888, a dividend of 1 per cent. on the preference shares was declared, the following words being added by way of amendment to the resolution: "It being understood that

(1) [1895] 2 Ch. 265, 272.

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of association, the preference shareholders were entitled to their preferential dividends irrespective of a declaration of the 34,014*l.* shall remain to the credit of revenue account."

In April, 1889, the accounts then shewing an excess of receipts over expenditure of 45,959*l.*, the directors in their report suggested a scheme whereby, though without present available funds in cash, they might declare and pay in bonds redeemable by annual drawings 5 per cent. on the preferred shares and 1 per cent. in cash; but this scheme failed in consequence of the decision of Stirling J. in *Wood* v. *Odessa Waterworks Co.*, (1889) 42 Ch. D. 636, and a dividend of 1 per cent. only was paid.

Except at the meeting of April, 1888, no resolution was passed as to any amount remaining to the credit of the revenue account, but the accounts were simply continued on the old footing and adopted at the annual meetings, the balance of revenue over expenditure appearing to the credit of revenue account year by year; and on December 31, 1894, the sum of 102,541*l.* 18*s.* 2*d.* was standing to the credit of that account, in respect of which 9000*l.* was expended in payment of the 1½ per cent. dividend. At the same time there was standing to the debit of capital account 8487*l.* 16*s.* 4*d.* On September 30, 1895, when the company went into voluntary liquidation, there was standing to credit of revenue account 114,420*l.* 1*s.* 5*d.*, which included 21,763*l.* 13*s.* 9*d.*, the balance of revenue over expenditure for the last preceding nine months, and there was at the same date a debit to capital account of 9631*l.* 5*s.* 6*d.* *

*Swinfen Eady*, *Q.C.*, and *Kirby*, for the liquidator.

*Hopkinson*, *Q.C.*, and *Clare*, for the preferred shareholders' representative.

*Buckley*, *Q.C.*, and *Whinney*, for deferred shareholders' representative.

*Stewart-Smith*, for preference shareholders having liberty to attend.

BYRNE J. stated the nature of the application, the date and object of incorporation, the amount of nominal and issued capital; the concession, the outlay, and the dividends declared, the date of winding-up; the carrying on of the business by the liquidators from September 30 till January 13, 1897, when the agreement for sale was completed (May 13, 1897); and continued:—Primâ facie the whole of this amount [about 220,000*l.*] is divisible amongst the shareholders in return of capital in proportion to their shares, but the preference shareholders claim to have certain sums paid to them in respect of dividend before anything is paid on account of capital.

The preference shareholders in the present case have a preference in respect of dividend only, and it becomes necessary to refer to the articles of association to ascertain whether they have such a preference as enables them to establish priority in respect of dividend.

The articles bearing on the subject are 101 to 105 [which he read]. It will be observed that these articles do not confer upon the owners of preferred shares any right to dividend unless the same shall have been declared, and, moreover, the dividend so declared is of a dividend to be paid to the members. Art. 101 is in terms permissive. Art. 102 negatives the right of the owners of deferred shares to any dividend until after a certain

dividend. In the present case their rights are not absolutely fixed by the memorandum, for it only gives the right to dividend

dividend shall have been declared and paid to the proprietors of preference shares, and it is only in the event of dividends of 6 per cent. being paid to the owners of both classes of shares that there is the imperative direction for division of the residue of profits. Art. 104 is again negative, and art. 105 provides for setting aside sums out of profits or receipts of the company in priority to the payment of any dividend.

It is common ground that, except as I have before mentioned, no dividends have ever been declared, and it is not now possible for a dividend to be declared. It is not, in my opinion, sufficient for the preference shareholders to shew that had the company been a going concern it might have declared a dividend which would have conferred such a right upon them as they seek to establish. Equally the company might not have declared a dividend and might have carried the balance to another credit, or applied it under art. 105.

I have next to consider whether the preference shareholders have established an agreement by the members of the company inter se, apart from the articles, which gives them this right. The case on their behalf is put in this way. [His Lordship continued as from * to *, supra.] It is claimed that out of the balance in the hands of the liquidators the amount standing to the credit of revenue account less the 9000*l.* ought to be distributed as dividend on the preferred shares. It is put in argument either (1.) as being a debt due from capital to revenue, which ought to be repaid out of the assets before division and then applied to pay dividends for the year to which the balance is properly attributable—and the resolution of 1888 and the annual accounts are referred to as shewing an agreement that this amount should be paid—or (2.) it is otherwise put as a debt due from the company to the preferred shareholders.

I think that the contention fails, that no agreement to the effect suggested is made out, and that the surplus assets are divisible amongst the shareholders by way of return of capital.

Having regard to the terms of the articles, I think the utmost that can be established is that a credit was kept up in the accounts in favour of revenue so as to ear-mark the amount which, when represented by cash, might be considered as available for revenue purposes, that is, for payment of future dividends, or for any of the purposes mentioned in art. 105.

I ought to mention two cases, namely, *Bishop* v. *Smyrna and Cassaba Ry. Co.*, [1895] 2 Ch. 265, and *Birch* v. *Cropper*, (1889) 14 App. Cas. 525, which were cited to me on behalf of the preference shareholders. I have been furnished with a copy of the memorandum and articles of association in the first of those cases, and it appears that there was, by the constitution of the company, a right to dividend at a fixed rate. The memorandum of association provided as follows: "The capital of the company is 800,000*l.*, divided into 40,000 shares of 20*l.* each. A portion of this capital, not exceeding 14,000 shares, shall have the right of receiving a dividend by preference and priority over the other 26,000 shares. The shares of the first description are called

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"subject to the provisions of the company's articles of association"; and art. 108 says that profits "shall, subject to the preference shares, and those of the second ordinary shares. The preference shares shall have right (1st) to a dividend of 7 per cent. per annum upon the amount paid up by preference and priority over the ordinary shares; (2nd) to one-fifth of the remainder of the net revenue after deduction of a sum sufficient for paying a like dividend of 7 per cent. on the ordinary shares." Then it provides what the ordinary shares are to have a right to: "It is, however, understood and agreed, that if in any year or years the dividend on the ordinary shares shall fall below 7 per cent., and that in subsequent years means shall exist of dividing larger profits than the above-mentioned first dividend of 7 per cent. per annum, the surplus profits shall be first of all applied to make up the deficiency borne by the ordinary shares in preceding years, and the remainder shall then be divided as expressed in the preceding paragraphs." There were certain special resolutions passed by the company dealing with the matter—the ultimate and last one appears to have been passed on July 9, 1893, and confirmed on the 25th of the same month—the effect of which was that a certain other article which had been passed should "cease to be deemed a regulation of the company, and the net profits of the company available for dividends (having regard to the conditions of the convention and to the rights of the debenture-holders) shall as from the 1st day of January, 1883, be divided in accordance with the memorandum of association of the company." I may say that the case to which I have referred is treated as a case of dividends on the preference shares having fallen into arrear. It is really a claim in respect of arrears of dividend, and the learned judge, [1895] 2 Ch. 272, says: "I do not myself see any answer to the claim of the preference shareholders that the profits should be applied in the first place in paying a dividend of 7 per cent. upon their shares, and in priority to everything else. Now that the powers of the directors to recommend, and the power of a general meeting to declare, a dividend are at an end, it seems to me that the rights of the preference shareholders still remain, and are still enforceable, because those rights are declared by the memorandum of association, or in other words by the contract into which the different classes of shareholders have entered." It appears to me it differentiates that case from the present in the important particular I have pointed out, in that the right is conferred as a right independently of declaration of dividend.

In the Bridgewater case the question which came up for consideration was somewhat different; but, so far as the case has a bearing upon the present, I find by reference to the report of *In re Bridgewater Navigation Co.*, [1891] 1 Ch. 155, 156, that there was a clause in the articles of association, which had given the directors certain powers to set apart sums, that, "Subject to the last preceding article, and subject to any arrangement which may from time to time have been entered into relative to the remuneration of any manager or other officer of the company by way of commission or a percentage on the net profits of the company or any part thereof, the entire net profits of each year shall belong"—*shall belong*—"to the holders

provisions thereinafter contained, be applicable" first in paying the preferential dividend. The words "shall be applicable" are not peremptory words like "shall be applied," and give the company a discretion as to applying profits in payment of dividends. Moreover, the claim is made subject to the subsequent articles, one of which (110) requires a declaration of dividend as a condition precedent to its payment. It does not follow that if the company had gone on the amount would have been distributed as dividend. It might have been carried to reserve under art. 103 (14), or applied in making good part of the capital which had been lost.

There is no reported case in which, while there has been a debit on the profit and loss account, a sum representing the profits of one particular period has been distributed as dividend after a winding-up has commenced. The amount as to which the dispute arises represents "surplus assets" within articles 6 (*b*) and 139, and must be distributed among the shareholders of the shares of the company and be divided pro ratâ upon the whole paid-up share capital of the company, and the directors may, with the sanction of the company in general meeting, declare a dividend to be payable thereout on the shares in proportion to the amounts paid up thereon." When new shares were issued it was provided, "The new shares to entitle the holders thereof to a dividend after the rate of 5 per cent. per annum upon the amount for the time being called up thereon, and taking precedence and priority over all dividends and claims of the holders of the ordinary shares of the company."

I have now to deal, which I can do very shortly, with the remaining claims. I have dealt with the claim which was perhaps the easiest to be established on behalf of the applicants, but they seek further by their summons to have applied certain other sums, namely, first of all, the revenue balance of the company for the nine months ending September 13, 1895. That is covered by what I have said. Then they claim profit realized in the liquidation by the liquidator carrying on the business for a certain time. If they fail upon the first point, they must fail upon this equally. Whether they would not have failed had they been successful on the first I need not now deal with. The remaining claim, namely, in respect of interest on the purchase-money, appears to me entirely to fail, quite independently of what I have said in respect of the first.

I think in principle this disposes of the whole of the summons; if there are any remaining points I will dispose of them now, but I think the only other point is the question of costs.

Solicitors: *Slaughter & May*; *Merriman, Pike & Merriman*; *Markby, Stewart & Co.*; *Turner, Son, & Foley.*

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of both classes in proportion to the amounts paid up on their shares. [He also referred to Buckley on Companies, 7th ed. p. 562.]

*Dunham*, in reply. In *In re Odessa Waterworks Co.* (1), the only profit as to which there was a dispute arose in the winding-up on the sale of the business. This case is very different. The memorandum of association gives the preference shareholders a fixed preferential right.

WRIGHT J. The simple question in this case is whether the sum of 1675*l.* 6*s.* 11*d.*, which is in effect excepted, as the profits of one year's trading, from the sale to the new company, is shewn to be a fund belonging to the preference shareholders of the selling company divisible amongst them in satisfaction of their right to a fixed cumulative preferential dividend. I do not think that there is any rule of law that profit on one year's trading cannot be divided merely because on the profit and loss account there is a deficit over on the balance of former years; but it does not follow from that that the amount of the profit of one year is necessarily to be treated as available for dividends. What the preference shareholders here have to make out is that this was a sum available for dividend, and I do not think that is made out. I do not understand that the decision of my brother Byrne in *In re Odessa Waterworks Co.* (1), as reported in the *Weekly Notes*, is directed exactly to the same point as the point which has been argued in the present case. There the preference shareholders, as I understand it, claimed preference dividends for a number of back years. That is not primarily the question here, and Byrne J. said that under the constitution of that company they could only claim dividends that were declared, and that, as there had not been any dividends declared at all, there was nothing they could claim.

That seems plain. I do not know that he intended to say anything that would help us in this case. Here there has been no declaration of dividend for the year in question, and there has been no recommendation by the directors of a dividend for

(1) Ante, p. 190, n.

the year in question. The directors have not brought their minds to the consideration of how much of the sum of 1675*l.* 6*s.* 11*d.*, if anything, ought to be carried to the reserve fund under art. 103, nor has any one on behalf of the company considered in what way the large sum of over 4000*l.* standing to the debit of profit and loss account ought to be dealt with. There must first of all be a profit; and, secondly, there must be a profit available for dividend before the preference shareholders have a right to come in. Profit is not an automatic thing, nor is a divisible profit an automatic thing. To my mind, it is most improbable that, if the company had continued to be a going concern, the entire 1675*l.* 6*s.* 11*d.* would ever have been treated as available for dividend. It is not clear that the directors, in view of the deficit on the profit and loss account, ever would have recommended any dividend at all. It is far from clear; and it is impossible now to shew what part of the 1675*l.* 6*s.* 11*d.* would have been treated as available for dividend, or whether any part of it would have been so treated. I should think it is in the highest degree probable that no part would have been divided. That it might have been divided is to my mind not enough; I think it must be shewn, not merely that it might have been made available for dividends by a certain action of the directors, but that it was actually made available for dividend; and that, I think, is not proved and cannot be proved. Therefore, it seems to me that the claim of the preference shareholders fails, and that the amount which has been mentioned is not available for distribution amongst the preference shareholders, but will drop into the ordinary assets and be divided accordingly. All costs ought to come out of the fund.

Solicitors for liquidators and ordinary shareholders: *Ashurst, Morris, Crisp & Co., for Stanton, Atkinson & Hudson, Newcastle-upon-Tyne.*

Solicitors for preference shareholders: *George Reader & Co., for Hoyle, Shipley & Hoyle, Newcastle-upon-Tyne.*

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*Dec.* 14, 17, 18.
1901
*March* 25.

## GARDNER *v.* HODGSON'S KINGSTON BREWERY COMPANY.

[1899 G. 1599.]

*Easement—Way—Prescription — Forty Years' User—Consideration—Annual Payment—Licence—Parol Agreement—Evidence—Inference from Facts—Indefeasible Right—"Enjoyment as of Right"—Lost Grant—Prescription Act*, 1832 (2 & 3 *Will.* 4, *c.* 71), *ss.* 2, 5.

For upwards of sixty years the plaintiff and her predecessors in title had openly and regularly used a cart-way to their messuage across the yard of the adjoining premises of the defendants and their predecessors in title. There was nothing in writing to shew how the user originated, but at the end of each year, for at least the last forty years of the period, a sum of 15*s.* had been regularly paid by the plaintiff and her predecessors to the defendants and their predecessors, though the origin and precise object of the payment were unknown. The plaintiff said (though this was not proved) that it was an annual contribution towards the repair of the way, whereas the defendants said it was rent for the use of the way for the year preceding the payment. The only writing in existence and produced relating to the payment was a receipt, given by the defendants to and accepted apparently without protest by the plaintiff, for the last payment before action—but after disputes had arisen between the parties as to the right to use the way—stating that it was for "right of way" for the preceding year. The defendants having threatened to close the way, the plaintiff brought an action to establish her right of way through the defendants' yard:—

*Held*, by Vaughan Williams and Romer L.JJ., that the proper inference to be drawn from the payment of the 15*s.* at the end of each year was that it was a payment for a licence for the user of the way during the preceding year, and that such payment was sufficient to negative an enjoyment of the way by the plaintiff and her predecessors "as of right" for the full period of forty years under ss. 2 and 5 of the Prescription Act, 1832 (2 & 3 Will. 4, c. 71); also, that the facts did not support the presumption of a lost grant. But

*Held*, by Rigby L.J., that the above inference was not necessarily to be drawn from the payment of the 15*s.*; and that since no agreement, verbal or otherwise, for that payment as consideration for the right of way had been proved to have been made within the forty years, and any verbal agreement before the commencement of that period could not control the right of way actually enjoyed during that period, an absolute and indefeasible right of way must be deemed to have been acquired and enjoyed "as of right" under the statute.

Decision of Cozens-Hardy J., [1900] 1 Ch. 592, reversed.

*Plasterers' Co.* v. *Parish Clerks' Co.*, (1851) 6 Ex. 630, and *Tickle* v. *Brown*, (1836) 4 Ad. & E. 369; 43 R. R. 358, discussed.

THE plaintiff, Miss Cordelia Gardner, as surviving trustee of the will of her mother, who died in 1891, was the present owner in fee of a house, with a stable yard and stabling at the back, known as No. 203, High Street, Sutton, Surrey. The premises had been in the occupation of herself and the preceding members of her family for a period of upwards of sixty years. Part of the house consisted of a shop facing High Street, where, during the whole of that period, a saddlery and harness-maker's business had been carried on by the successive members of her family, it being at present carried on by herself, her brother and sister, under the style or firm of A. J. E. & C. Gardner. For the like period the yard and stabling at the back had been used for the business of a livery-stable keeper and, until recently, a knacker's yard.

The defendants, Hodgson's Kingston Brewery Company, Limited, were, and had been for about sixteen years, the owners in fee of an inn called the Red Lion, facing High Street, with a yard and stables at the side and rear. This yard contained a well and pump. The yard of the inn adjoined the yard of No. 203, High Street, and the only access for horses and carts to and from the yard of No. 203 was through a gateway and gate from that yard into the Red Lion yard, and thence through that yard into High Street. This access or way had been in open and regular use and enjoyment by the plaintiff and her predecessors for the purposes of their businesses and in connection with the use and occupation of No. 203 during the whole of the above-mentioned period without interruption. The water from the well and pump was and had been also openly and regularly used by them in the businesses and for domestic purposes. From the year 1855 at least, if not earlier, an annual sum of 15*s.* had been regularly paid by the owners for the time being of No. 203 to the owners for the time being of the Red Lion. How or at what precise date this payment originated was absolutely unknown, and there was no agreement in writing of any kind in existence

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in reference to it. The plaintiff alleged that the payment was for the annual cost of repairing the roadway across the yard through its being cut up by the frequent passage of carts over it; but there was no evidence to support that allegation. On the other hand, the defendants alleged that the payment was in respect of the right of way, and was in the nature of rent. It appeared that the payment, for whatever purpose it was made, was made, not in advance, but after the termination of the year in respect of which it was made. So far as the plaintiff's evidence went on this point, it appeared that every year since she had been in possession of No. 203 a man called at the shop on behalf of the defendants for the 15*s*., and this was usually paid by her or her brother out of the till, a receipt being sometimes given and sometimes not. She was only able, however, to produce one receipt for the 15*s*., and this was given by the defendants after the dispute had arisen which led to the present action. It was filled up on what was, apparently, one of the defendants' usual printed receipt forms, and was as follows:—

"No. 3641. Kingston Brewery.

"Received the 24 day of January, 1899, of Mr. Gardner, the sum of Pounds, fifteen shillings and pence.

"Right of way to 29 September /98.

"For Hodgson's Kingston Brewery Co., Ld.

"£— 15*s*. G. W. Knapp."

On March 31, 1898, the secretary to the defendant company wrote and sent the plaintiff's firm a letter inclosing the following notice: "We hereby give you notice that on and after 1st of May next we shall require you to give up the use of the yard of the Red Lion, Sutton, and to close the gate now giving access from your premises to the yard in question. The right of going through the said yard of the Red Lion Inn, Sutton, for which you have paid us an annual rent of 15*s*. (fifteen shillings) shall therefore be abolished as and from the 1st day of May next. Dated this 31st day of March, 1898. For and on behalf of Hodgson's Kingston Brewery Company, Limited. V. N. Donetil, Secretary." Thereupon the plaintiff,

acting on the advice of a friend, not a lawyer, wrote and sent to the defendants, in the name of her firm, the following letter: "19th April, 1898, Sutton, Surrey. Gentlemen,—Replying to your letter of March 31, we are quite unable to agree to the proposal to close the gate, as, independent of the right of way for which we pay 15*s.* per annum, we have a right of access to and use of the pump, which has existed for a great number of years, and we do not see how this right could be given up without our interests being affected. Excepting through the yard there is no other outlet. We also wish to point out that, as regards your notice to give up the right of way, we are, as you are aware, yearly tenants, and therefore one year's notice should be given us from September next. Yours obediently, A. J. E. & C. Gardner."

The defendants' notice of March 31, 1898, was not persisted in; and on January 24, 1899, the plaintiff or her brother paid them a sum of 15*s.*, for which they gave the receipt of that date in the form above set out. The receipt was accepted in that form without, apparently, any protest by the plaintiff or her brother.

On February 16, 1899, the defendants served the plaintiff with a notice, addressed to her firm, "to quit and discontinue the user of the yard on the expiration of the year of your tenancy, which shall expire next after the end of one-half year from service of this notice."

As the defendants threatened to close the gateway in question, the plaintiff, on August 11, 1899, issued the writ in this action, claiming a declaration that she was entitled to a right of way through the gateway into the defendants' yard to and from the pump, and a right to take water therefrom, and also a right of way for carts and horses through the gateway across the defendants' yard to and from High Street; also an injunction to restrain the defendants from obstructing or interfering with either of such rights of way.

In her statement of claim the plaintiff alleged that for upwards of sixty years she and her predecessors had used the road or way and also the pump "without interruption as of right." With regard to the 15*s.* a year, she alleged, as already

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stated, that it was paid by way of contribution towards the cost of keeping the road or way in repair.

In their statement of defence the defendants alleged that the yearly sum of 15*s.* "was in fact paid as and by way of rent for the use of the said road or way under a yearly tenancy." They stated that they did not desire to contest the plaintiff's claim to the use of and access to the pump, and accordingly admitted it.

At the trial of the action before Cozens-Hardy J. (1), his Lordship drew the inference from the above facts that a licence or permission to use the way across the defendants' yard had been given by parol more than forty years before action brought, but was subject to the payment of 15*s.* a year; and he held that the plaintiff had acquired an indefeasible right of way under s. 2 of the Prescription Act, 1832 (2 & 3 Will 4, c. 71). He was further of opinion that, if necessary, a lost grant ought to be presumed. He accordingly gave judgment, as already reported, for the plaintiff.

The defendants appealed.

The appeal was heard on December 14, 17, and 18, 1900.

*Hon. E. C. Macnaghten, Q.C.*, and *George Cave*, for the defendants. The first question is, What was the object of the payment of the yearly sum of 15*s.*? The learned judge has drawn the inference that it was paid for the licence or permission to use the way in question. That being so, we submit that the plaintiff cannot rely upon any right of way by prescription under the Prescription Act, 1832 (2 & 3 Will. 4, c. 71). The words "enjoyed by any person claiming right" in s. 2 (2),

(1) [1900] 1 Ch. 592.

(2) Sect. 2 enacts that, "No claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water of our said Lord the King, his heirs or successors, or being parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by shewing only that such way or other matter was first enjoyed at any time

and "enjoyment thereof as of right" in s. 5, mean an enjoyment had openly, notoriously, and without leave or permission from time to time: *Tickle* v. *Brown* (1); *Beasley* v. *Clarke*. (2) The plaintiff herself admits by her letter of April 19, 1898, that she paid the 15*s*. for the right of way, and that she was liable to have her "tenancy" determined on proper notice. The learned judge appears to have thought that an uninterrupted enjoyment for more than forty years, though had admittedly by consent, gave an indefeasible right; but we submit that he has taken an erroneous view of *Tickle* v. *Brown* (1), the leading case on the subject, and has not given full effect to the expression "as of right" in s. 5. The enjoyment must be "as of right," and the payment of the 15*s*. being inconsistent with the plaintiff's claim to enjoyment "as of right," her case must fail.

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prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing."

Sect. 5 enacts that, "In all actions upon the case and other pleadings, wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and if the same shall be denied, all and every the matters in this Act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and that in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this Act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in this Act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation."

(1) 4 Ad. & E. 369; 43 R. R. 358.

(2) (1836) 2 Bing. N. C. 705; 42 R. R. 704.

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[VAUGHAN WILLIAMS L.J. The observations of Blackburn J. in *Bennison* v. *Cartwright* (1) are a complete affirmation of Lord Denman's statement of the law in *Tickle* v. *Brown*. (2)]

And also of the law as laid down in *Beasley* v. *Clarke* (3), where Tindal C.J. held that the interpretation put on s. 5 in *Tickle* v. *Brown* (2) must be accepted as its proper construction, and that the party denying the claim of user for forty years as of right and without interruption was at liberty to shew the character of the user—that it was merely a precarious enjoyment by leave and licence. *Dalton* v. *Angus* (4) and *Plasterers' Co.* v. *Parish Clerks' Co.* (5) are quite consistent with *Tickle* v. *Brown* (2), for in those two cases the sole question was whether there had been actual enjoyment. To prevent the acquisition of a right by prescription, it is not necessary that there should be a licence every year: payment of rent is a sufficient admission that user can be stopped at any time. *Chamber Colliery Co.* v. *Hopwood* (6) is an instance of a claim to a right by prescription failing in consequence of what Lord Denman terms, in *Tickle* v. *Brown* (2), an enjoyment only "by tacit sufferance"—that is, by a friendly comity between the parties. It is impossible to assert here that a right of way has been acquired as an easement of necessity, for there is no evidence of the plaintiff's tenement having been granted by the owner of the defendants' tenement, and the plaintiff's tenement is not land-locked: it is open to the street. The mere fact that the closing of the way may cause the plaintiff inconvenience does not entitle her to use the defendants' land. She must shew an enjoyment as of right, and it is open to the defendants to displace her claim by shewing a parol licence: *Gaved* v. *Martyn*. (7) If it is said that these payments were in fact made under a parol licence or consent given prior to the forty years, so as to confer upon the plaintiff an indefeasible right, there is no such licence or consent proved; and there is no true ground for inferring that the payments

(1) (1864) 5 B. & S. 1, 18.
(2) 4 Ad. & E. 369; 43 R. R. 358.
(3) 2 Bing. N. C. 705; 42 R. R. 704.
(4) (1881) 6 App. Cas. 740.
(5) 6 Ex. 630.
(6) (1886) 32 Ch. D. 549.
(7) (1865) 19 C. B. (N.S.) 732.

were made under some parol agreement before the forty years. There can be no doubt that a licence, written or by parol, for a limited period is sufficient to displace a claim of a right of way under s. 2: *Bright* v. *Walker*. (1) And an enjoyment by consent is sufficient to destroy a claim by lost grant. A licence even by deed of an exclusive right does not enable the licensee to maintain an action for the disturbance of his right by a third person: *Hill* v. *Tupper*. (2) Here we have the admitted fact that in every year during the forty years a payment has been made, which must be taken as evidence of a licence for the user of the way for that year—a licence which can at any time be revoked. There could not be a stronger instance of "precarious enjoyment." Then there has been a break of enjoyment for more than a year before action brought, which is fatal to the plaintiff's claim: *Lowe* v. *Carpenter*. (3)

*Micklem, Q.C.*, and *E. S. Ford*, for the plaintiff. With regard to the plaintiff's letter of April 19, 1898, she did not understand her real position, and therefore should not be held bound by her admissions. The licence to use the way was not revocable, for the plaintiff kept up her premises on the faith of this licence to use a way which is vital to the proper use and enjoyment of her premises. Under the statute a permissive user—that is, a user by leave and licence—gives an enjoyment as of right at the end of forty years: after adverse possession for forty years the title of the person claiming the easement becomes indefeasible. This is not a case of enjoyment by tacit sufferance, but of entry under a parol agreement, as is shewn by this payment of 15*s*. a year—an agreement made more than forty years ago. The Act assumes that you can acquire a title as of right, though you enter under a parol agreement. If, then, the plaintiff is enjoying this way under a parol agreement, she is "claiming a right thereto" within s. 2; otherwise the section has no meaning; and that right can only be defeated by proving an agreement in writing. We submit that the learned judge's view of *Tickle* v. *Brown* (4) was correct, and that, as in

(1) (1834) 1 C. M. & R. 211, 219; 40 R. R. 536.
(2) (1863) 2 H. & C. 121.
(3) (1851) 6 Ex. 825.
(4) 4 Ad. & E. 369; 43 R. R. 358.

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that case, the payment is attributable to a parol agreement made before the forty years, and the circumstances here negative the inference that there was a fresh agreement or licence each year. No presumption of leave arises when a payment has been made from time immemorial.

[VAUGHAN WILLIAMS L.J. In *Kinloch* v. *Nevile* (1), a case of a claim for twenty years' enjoyment, Alderson B. said: "If a parol permission extends over the whole of the twenty years, the party enjoys the way as of right and without interruption for the twenty years; not so, if the leave given be from time to time within the twenty years."]

We rely on that case as an authority in our favour. The point there was that an agreement before the twenty years could only be got rid of by shewing leave given from time to time within the twenty years. No leave can be shewn to have been given at all within the period in the present case, the forty years. No leave was asked: there is nothing here beyond a mere payment made from time immemorial; so that *Tickle* v. *Brown* (2) and *Kinloch* v. *Nevile* (1) are authorities distinctly in our favour. In a closely analogous case of ancient lights, *Bewley* v. *Atkinson* (3), James L.J. said the object of the Act was that the question should not be allowed to depend on parol evidence, and that the agreement which would prevent the acquisition of an indefeasible easement must be in writing; and Baggallay L.J. said that payment of rent by itself, apart from a written agreement, was not an "interruption" within the Act. All we have here is an annual payment referable to some agreement which cannot be proved. The onus is on the defendants to prove an agreement; the plaintiff asserts her title under the Act. Whatever the agreement was, it was an agreement come to before the forty years, and the payment of the 15*s*. is necessarily referable only to an agreement so made. It is quite clear that no agreement was come to within the forty years, and the learned judge has so found. The true inference then is that the entry was under some

(1) (1840) 6 M. & W. 795, 806.
(2) 4 Ad. & E. 369; 43 R. R. 358.
(3) (1879) 13 Ch. D. 283, 292, 294.

agreement, and that that agreement was more than forty years ago. That being so, the Act applies.

As to *Chamber Colliery Co.* v. *Hopwood* (1), it is clear from the judgment of Cotton L.J. (2) that on the facts of that case the enjoyment of the watercourse in question was an enjoyment by permission, and therefore could not be an enjoyment "as of right" as claimed.

*Bright* v. *Walker* (3) was only a twenty years' case arising under the earlier part of s. 2, and does not apply to a forty years' case under the later part: *Beggan* v. *M'Donald* (4); *Harris* v. *De Pinna* (5); *Hanna* v. *Pollock*. (6) The true view of the Act is this: once establish that you are in by consent or agreement, then, at the end of the forty years, you acquire an absolute and indefeasible right.

Then, with regard to a title by lost grant, that will now be presumed by the Court if reasonably necessary in order to support an old user: *Dalton* v. *Angus*. (7) There is no difficulty in the Court finding a form of grant creating the rights of the parties, reserving the annual payment in the form of a rent-charge for the easement or right of way, as in Davidson's Conveyancing Precedents, vol. ii. 4th ed. p. 571, Form 77. If the plaintiff's letter of April 19, 1898, is to be read against her strictly, then we plead lost grant, in which case it is not necessary to shew continuous user, or possession as of right. In *Onley* v. *Gardiner* (8), although it was held that the easement could not exist under the Act by reason of the twenty years' enjoyment claimed having been broken by periods of unity of possession, yet the Court, at the end of the judgment, gave leave to plead lost grant. Under a title by statutory prescription the plaintiff would not be bound to continue paying the 15*s*., because her right would, we submit, be indefeasible, but under lost grant she would be bound to do so.

[VAUGHAN WILLIAMS L.J. Do you say that, if you have

(1) 32 Ch. D. 549.
(2) Ibid. 557.
(3) 1 C. M. & R. 211; 40 R. R. 536.
(4) (1878) 2 L. R. Ir. 560.
(5) (1886) 33 Ch. D. 238, 251-3.
(6) [1900] 2 I. R. 664, 679 et seq.
(7) 6 App. Cas. 740.
(8) (1838) 4 M. & W. 496; 51 R. R. 704.

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acquired a title under the Prescription Act, you are not bound to go on paying the 15*s.*?]

Yes; but we think it would be fair to continue the payment. The plaintiff's right is absolute and indefeasible, and the mere payment of rent for the user of an easement is not an "interruption" of the enjoyment: *Plasterers' Co.* v. *Parish Clerks' Co.* (1)

*Hon. E. C. Macnaghten, Q.C.*, in reply, referred, on the question of lost grant, to *Dalton* v. *Angus* (2) and *Campbell* v. *Wilson.* (3)

[VAUGHAN WILLIAMS L.J., upon the question of interruption of the enjoyment of an easement, referred to Bullen and Leake on Pleading, 3rd ed. p. 714, note (*a*), and *Hardon* v. *Hesketh.* (4)]

*Cur. adv. vult.*

March 25. RIGBY L.J., after describing the relative position of the plaintiff's and the defendants' premises, and the direction of the road or way through the cart-gate and the Red Lion yard into the High Street, continued:—The evidence is clear that, from the earliest times the use of this road, with horses and carts, for carrying in and out everything required in conducting the business of a knacker's yard and a livery-stable keeper, has been constant and uninterrupted, and necessarily quite open; and it has been continued down to the present time without break or alteration of continuity of any kind. This evidence was uncontradicted, and at the trial and on the appeal unquestioned. The user of the right of way has in fact been as of right, meaning thereby that it has been such as a person rightfully entitled would have had. The only suggestion made by the defendant company has been that, by reason of the payments of 15*s.* yearly, the user has not been as of right. This is dealt with hereafter. [His Lordship then referred to the right claimed by the owners for the time being of No. 203, High Street, to the use of the pump, which right was, soon after the commencement of the action, admitted by the defendant company, and continued:—]

(1) 6 Ex. 630.
(2) 6 App. Cas. 811–3.
(3) (1803) 3 East, 294; 7 R. R. 462.
(4) (1859) 4 H. & N. 175.

For many years an annual payment of 15*s.* has been made by the owners of No. 203 to the owners of the Red Lion Inn. It is not denied that this payment is in some way connected with the right of way; and the receipt given on January 24, 1899, was expressed to be for "right of way to 29 September /98." It is noteworthy that the receipt is not expressed to be given for a year's right of way. Different interpretations, however, are put upon the payment by the plaintiff and the defendants respectively. The plaintiff has contended that the payments were made by way of contribution towards the repair of the Red Lion yard. The defendants have strenuously contended that the 15*s.* is a rent paid for use of the right of way. Properly speaking, no rent could be payable for an incorporeal hereditament such as a right of way; and the defendants' contention, in its ultimate and, legally speaking, its most plausible form, if only there were facts to support it, is that the payments were in the nature of consideration for a licence, renewable year after year and valid only for a year at a time, to use the road through their, the defendants', yard for the purposes of the plaintiff's business.

One difficulty in the way of the last-mentioned contention is that the 15*s.* was not paid in advance, but only after the end of the year in respect of which it purported to be made. Another is that the sum appears to have been in later years insufficient as a consideration, though originally, when Sutton was a much smaller place than it has now grown into, the sum may have been a fair equivalent. A further difficulty in the way of the defendants is that they always treated the user of the road as being by right and not by licence.

As regards the contention of the plaintiff, it seems clear that the plaintiff's witnesses have no personal knowledge on the matter, though the assumption actually made was, having regard to what was done about the pump, not an unlikely one to be made by them.

The truth clearly is that no witness on either side has any personal knowledge about the way in which the user either of the pump or of the right of road originated, or of the way in which, or of the consideration for which, the annual sum of

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15*s.* became payable. No deed or writing dealing with the question has been found, so that there is absolutely nothing to shew on what terms the right of road or other easement began to be enjoyed. It was agreed at the trial that the annual sum of 15*s.* had been regularly paid, at least from the year 1855, but absolutely nothing more was proved or known about it. The important point to notice is that no agreement with reference to it is now suggested to have been made within the period of forty years. How long before the commencement of that period it began to be paid, or for what purpose it was paid, is left altogether uncertain. No evidence, therefore, exists that it was even paid within the period, either as a consideration for a renewal of a yearly licence or for a year's user, or indeed for any other advantage given by the owners of the Red Lion to the owners of No. 203.

If indeed there had been the clearest evidence of an agreement as to the payment of the 15*s.* as consideration for a licence or for a year's user of the right of way, it would not have been admissible to control the right of way actually enjoyed during the forty years, since it must have been a verbal agreement before the commencement of that period. As we could not rely upon a verbal agreement entered into before the period of forty years, however proved or however clearly admitted, we cannot of course argue from any conjectural interpretation of the proved facts, however plausible. No conjecture falling short of necessary inference is admissible: in other words, it has to be shewn, of a suggested interpretation of the facts, in order to exclude the operation of the Prescription Act, not only that it may, but that it must, be the only possible interpretation. This certainly cannot be done with regard to a licence revocable at will, or a grant for one year only, determinable within the year.

In order to justify the conclusion that the existing state of facts is inconsistent with the acquisition under the Prescription Act by forty years' user of an absolute and indefeasible right of way, it is absolutely necessary to assume that each annual payment of the 15*s.* has to do at most with the right of way for one year only, so that the successive payments may be

taken to involve successive permissions for one year at most. To me it appears that such an assumption, so far from being necessary, is altogether arbitrary and unwarranted. This will be shewn by an examination of the probabilities of the case.

Independently of the Prescription Act, the question to be solved is, How did it come about that a business should be carried on in a yard surrounded with buildings on all sides but one, and on that one side making necessary use of a cart and horse way through the adjoining property, and also use of a well of water on such adjoining property? Probably the most natural hypothesis would be that the properties at some remote former time were in one ownership, that the buildings were erected before the severance of ownership, and that on the severance by conveyance the right of road and right to use the well were annexed to the separated property, as the former at any rate would be as a way of necessity though not mentioned. This does not account for the annual payment of the 15*s.*; but that might have been reserved expressly, and, if so reserved, would in all probability be reserved either in perpetuity or until the owner of the servient tenement ceased to require it.

Putting aside the hypothesis of common ownership, it is highly improbable and almost inconceivable that the owner of the now dominant tenement would have built all round his yard where he had no right of exit, and gone to the expense of preparing for a business requiring a supply of water and access by carriages and horses without securing both rights beforehand. Some such arrangement as the following would be probable: That he, helping to provide and maintain the well and pump, should have in perpetuity, or at least so long as he required it, the right of the water supply and the right of way for his business. The consideration of 15*s.* a year might at the remote period that we are postulating be a not insufficient consideration for the right of road. The arrangement might be carried out by deed which has been lost, or no deed may have been executed. In the latter case there would be no legal easement either for water or road, but, as Lord Denman pointed out in his judgment in *Tickle* v. *Brown* (1), the want of such a

(1) 4 Ad. & E. 369; 43 R. R. 358.

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legal right would in no way prevent the person claiming the easement from claiming as of right. Of course I do not say that such an arrangement as I have indicated can be taken as proved. It is, however, more likely to have taken place than a mere bargain for a right of way for a year. The hypothesis of a mere licence revocable at any time seems the most unlikely of all. There is no way of accounting for the incongruity of bargaining for a perpetual right of water, which is admitted, and neglecting to bargain for the at least equally necessary right of way not determinable at the will of the grantor.

That the mere payment of an annual rent is not to be interpreted as involving an interruption of a user as of right is shewn by the case of *Plasterers' Co.* v. *Parish Clerks' Co.* (1), where, as is pointed out by Cresswell J., the user of the light must necessarily have been as of right. Lord Campbell's judgment makes it clear that the decision that the payments did not cause an interruption in the user was founded on the construction of s. 4, and was applicable equally to cases within s. 2 and s. 3.

The defendant company, however, rely upon what they consider to be an admission of a yearly tenancy as to the right of road which enables them to get rid of the right by a notice to quit; or, at least in the alternative, which entitles them to say that there was an interruption in the enjoyment "as of right" of the easement for the space of a year during the period of forty years required by the Prescription Act for making the right absolute and indefeasible; and this is the case made out by their pleadings as amended. It is necessary, or at least desirable, to examine this claim.

[His Lordship then read the defendants' notice of March 31, 1898, to give up the use of the yard and to close the gate, and the plaintiff's reply of April 19, 1898, observing that both parties were under a misapprehension as to their position, the defendants being inaccurate in stating that an annual rent of 15*s*. had been paid for the right of going through the Red Lion yard, for no rent could be payable for a mere easement, and the plaintiff (or the firm representing her) being misled by the

(1) 6 Ex. 630.

defendants' notice into assuming in her reply that she was a "yearly tenant," or that the case was one between landlord and tenant. Then, after referring to the defendants' subsequent notice to quit on September 29, 1899, his Lordship proceeded:—]

I agree with Cozens-Hardy J. in the conclusion at which he arrived, and do not think it necessary to go through the numerous authorities discussed by him in his judgment or cited before us. As is hereinbefore stated, user of the right of way during the whole period of forty years by persons claiming to use in succession as a matter of right, is proved by ample evidence, and the so-called admission of a year-to-year tenancy not having been established for the reasons above given, there remains only the unexplained payment of the annual sum of 15*s*. But that payment began to be made before the period of forty years commenced, and no agreement with reference to it within the forty years has been proved or suggested. This distinguishes the present case from the case, as to the admission of evidence, of *Tickle* v. *Brown* (1), where it was proposed to give in evidence a payment originating within the forty years, which would cause, if proved, a discontinuity in the user.

In my judgment the appeal ought to be dismissed. The judgment makes no provision for the continued payment of the 15*s*. I must not be understood as expressing any opinion on that point. It is not necessary to do so, since the defendant company expressly repudiated any wish to have it decided in their favour.

VAUGHAN WILLIAMS L.J. (after stating the facts). It is contended by the defendants that the inference drawn by Cozens-Hardy J. is not the right inference, but that the true inference is simply that the enjoyment was by reason of permissions granted during the period of forty years, and not as of right. Now there can be no doubt but that the fact of the payment in each year is evidence, primâ facie, that enjoyment was not as of right; it is, to use the words of s. 5 of the Prescription Act, evidence of a fact inconsistent with the

(1) 4 Ad. & E. 369; 43 R. R. 358.

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simple fact of enjoyment as of right. The evidence is not offered by the defendants as evidence of an agreement. The defendants are not confessing the enjoyment as of right and avoiding the effect of such enjoyment by setting up the agreement under which the enjoyment was had; on the contrary, it is the plaintiff, the party claiming the prescriptive right, who seeks to set up the agreement, and then to say, "You, the defendants, cannot take advantage of this agreement to negative my claim to a prescriptive right because the agreement which I am setting up was not in writing." This agreement which the plaintiff asks the Court to infer, and which Cozens-Hardy J. does infer, is not dependent on the lapse of forty years: it is not a statutory inference, neither is it an inference based upon some recognised legal fiction arising after the lapse of twenty or some other number of years. It is a mere inference of fact based upon the payment of 15*s*. a year for a long period, the origin of which payment there is no evidence to explain. But it is to be observed that the annual payments are equally consistent, or, at all events, consistent, with a fresh permission in each year. Moreover, the probability that such was the true fact, and the improbability that there was one permission or agreement covering the whole period of forty years, is enhanced by the consideration that a parol licence creates no right or interest in the licensee over the land, but is revocable by the licensor at any moment.

The 2nd and 5th sections of the Prescription Act are difficult to construe; but I believe that the true meaning of the provision that, where a way "shall have been so enjoyed as aforesaid" (as of right) "for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing," is that an enjoyment which appears to be as of right otherwise than under a right conferred by the consent or agreement of the person owning the land in respect of which the way or other easement is alleged, shall not be defeated or lose its effect by evidence that the enjoyment was permissive, unless such permission, consent, or agreement was in writing.

If this is the true view, it will follow that, wherever the

enjoyment does not appear to be of right, the proviso has no application; and that, therefore, if it appears that there were payments for the enjoyment during the forty years the proviso cannot apply, for, the enjoyment primâ facie not appearing to be as of right, the landowner over whose land the way is claimed has no need or occasion to set up a consent or agreement covering the whole period of forty years. It is sufficient for him that the payments made during the forty years primâ facie negative the enjoyment having been as of right. It may be that it is open to the person claiming the easement to go on and prove that the payments were in fact made under a parol consent or agreement given or made before the forty years began, and it may be that this would give the claimant an indefeasible right to the easement; but there is no evidence here of such consent or agreement in fact; and I think it would be wrong to infer from the annual payments of 15*s*. a parol agreement made before the beginning of the forty years and remaining in force for the whole period.

The inference from a payment in one year is, I might almost say admittedly, that the enjoyment in that year was not of right, and I cannot see why the inference should be different because the payment is made for a number of years in succession. In each year it seems that the payment is compensation for the past user, and, as such, an acknowledgment that the past year's user has not been of right. The payment on January 24, 1899, is itself evidence that the plaintiff was not enjoying the easement as of right.

The cases of *Plasterers' Co.* v. *Parish Clerks' Co.* (1) and *Bewley* v. *Atkinson* (2) to my mind are not in point, because those cases, being light and air cases, were governed by s. 3 of the Prescription Act; and as, under that section, it is not necessary that the enjoyment should be of right, it was impossible to rely on the long-continued payments as admissible in evidence to negative the enjoyment having been as of right. Moreover, in the *Plasterers' Case* (1) payments were only relied on as admissible to prove an interruption within the meaning of s. 4; and the Court held that the payments were no evidence

(1) 6 Ex. 630. (2) 13 Ch. D. 283.

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of an interruption, because an interruption of a right claimed under s. 3 could only be by discontinuance of the enjoyment. Lord Campbell says (1): "We are not called upon to say whether the payment might not be made use of to shew that this was not such an enjoyment as was contemplated by the statute as capable to confer the right"; and Maule J. adds: "Your argument must go to the length, that an enjoyment which is paid for is interrupted; but the 3rd section shews, that there may be an uninterrupted enjoyment granted by an instrument in writing." Thereupon both these learned judges, having refused to deal with any other question except that raised by the bill of exceptions, namely, whether the ruling of the Lord Chief Baron that the demand of rent for the lights and payments made in compliance therewith was an interruption within the meaning of the statute was right, proceeded to hold that the interruption in s. 3 of 2 & 3 Will. 4, c. 71, must be an actual discontinuance of the enjoyment by reason of an obstruction submitted to or acquiesced in for a year. The case, to say the least of it, leaves untouched the proposition established by *Tickle* v. *Brown* (2) that, in a case of an easement claimed under s. 2, a payment within the period of twenty or of forty years may so negative the enjoyment as of right as to prevent a claim under the statute for an easement.

This is all I have to say about Cozens-Hardy J.'s inference that a licence to use this way across the yard was given by parol more than forty years before action brought, excepting that I wish to point out that a succession of annual payments of so-called rent for the enjoyment of an easement for a number of years in succession will not constitute a continuous licence for the whole period. The case is very different from a tenancy of land, in which case the resulting tenancy from year to year would be continuous.

Cozens-Hardy J. also, though preferring to base his judgment on the Prescription Act, alternatively bases his judgment on presumption of lost grant. I think there is no room for any such presumption. The enjoyment can be accounted for as a lawful enjoyment without reference to any such grant, on the

(1) 6 Ex. 635. (2) 4 Ad. & E. 369; 43 R. R. 358.

theory of payments made under a licence renewed from year to year, the payments being acknowledgments that the enjoyment of the previous year had not been as of right, and not payments of rent.

Moreover, there is this difficulty about the suggested lost grant—that a perpetual lease of an easement subject to an annual payment is a legal impossibility; and I doubt whether there can be a grant of an incorporeal hereditament subject to a perpetual payment in the nature of a fee farm rent. In my opinion the judgment of Cozens-Hardy J. ought to be reversed and judgment entered for the defendants.

ROMER L.J. The question to be decided in this action is whether or not the plaintiff has enjoyed the way over the defendants' premises "as of right" within the meaning of ss. 2 and 5 of the Prescription Act. The difficulty which arises is not one of law on the interpretation or meaning of the Act, but one depending on the inference to be drawn from the facts proved. The case of *Tickle* v. *Brown* (1) defined "enjoyment as of right." The words of Lord Denman C.J. in delivering judgment in that case have been so often cited that I need not repeat them here. It is clear that, if the enjoyment has been by permission granted by the owner of the servient tenement during the forty years, then the enjoyment is not of right. Lord Denman, besides speaking of "permission," used the phrase "by tacit sufferance." I do not quite know what he meant by tacit sufferance, but I think he was contemplating a case similar to that we have now to deal with. But it cannot now be doubted that, if from the facts proved the inference be that the enjoyment during the forty years has been by permission granted during that time, then no right can be acquired under the Act in respect of that enjoyment. Of course, when I speak of the "facts proved," I exclude any attempt to establish by evidence any consent or agreement not in writing given or made prior to the forty years.

I now proceed to apply the above to the circumstances of this case. Undoubtedly the plaintiff and her predecessors have

(1) 4 Ad. & E. 369; 43 R. R. 358.

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used the way claimed by her for more than the forty years in a manner which would enable her to claim the benefit of the statute had there been no yearly payment made. But she and her predecessors have, at the end of each year during this period, made a yearly payment to the defendants and their predecessors in respect of the user of the way during that past year. Now, it appears to me that if nothing were known of the circumstances under which, during one particular year of the forty, a certain payment had been made in respect of the user of a way for that year, the proper inference from the mere fact of payment would be that the payment was made for permission asked and granted to use the way for that year. And, indeed, I think that was one of the points decided in *Tickle* v. *Brown* (1); nor would it, in my opinion, make any difference that the payment was made at the end, and not at the beginning, of the year.

But then comes the difficulty in the present case, about which I have felt great hesitation, especially having regard to the view taken by my brother Rigby. Is the inference that would be drawn, in the case of payment in a single isolated year, one that ought also to be drawn with regard to each payment in circumstances like the present, where the payments have been made for the whole period, and where no express application for permission during that period is shewn, and the yearly payment is a small one? It is only with reluctance that I have come to the conclusion that, even in the circumstances of this case, the proper inference is that each payment was for permission to use the way for the preceding year.

In the first place, the fact that the permission was not expressly asked for or given in each year is just what one would expect when the user was continued for several years. So long as the payment was made at the end of each year, and the parties did not wish that the user should cease, they would naturally proceed on the tacit understanding between them as to their relative positions shewn by the payment made each year, and would not go each year through the form of expressly asking for, or expressly granting permission for, the user for

(1) 4 Ad. & E. 369; 43 R. R. 358.

each coming year. The application and grant would be tacitly assumed to have been made. And in the next place, I do not think much importance can be attached to the fact of the payment being small. However valuable the way may be to the plaintiff, I cannot say that the payment is so small as compared with the inconvenience caused by the user to the defendants or their predecessors that I ought to assume that they did not sooner withdraw their permission because they had no power to do so.

Then, are there any other facts in the case which could prevent me drawing the inference I have? I think not. The form of the only receipt for the yearly payment which is forthcoming does not appear to me to materially assist either side, except that it purports to shew that the payment was in respect of the right of way for the preceding year. The words "right of way" written on it may well be referred to the right obtained by the permission.

Then the inconveniences which will result to the plaintiff in her business if she fail to establish her claim to a right of way, though they account for the reluctance I have felt as previously expressed, are not grounds upon which the Court ought to act in determining this case. No doubt the plaintiff may have reasonably expected, and did expect, that the permission so long given would continue, but this expectation will not support a claim as of right.

[His Lordship then referred to some of the allegations in the pleadings, and after stating that the question was one that ought not to be determined by the form of the pleadings, proceeded:—]

I am fortified in the conclusion I have come to by the following considerations: If the yearly sum was not paid for permission to use the way, on what footing was it paid? Suppose the plaintiff had wished to cease using the way and to stop payment of the yearly sum, and had given notice to the defendants of her intention, and in accordance with her notice had not used the way for a year: could the defendants have succeeded in an action brought by them against her to compel payment of the yearly sum for that year? I think not. It appears to me that such an action must have failed, and I think it would have failed, because the Court would have held on the facts

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now before us that the user was by permission, and that the payment was only due when the permission was expressly or impliedly sought for and obtained. The Court could not, from the facts proved in this case, have inferred in favour of the defendants a lost grant to secure the yearly sum. Indeed, it is difficult to see what lost grant they could have suggested. It would have been hopeless to suggest that the yearly sum was in the nature of a rent-charge issuing out of the plaintiff's tenement. And I cannot see what other legal supposition could have been successfully made by the defendants by which payment of the yearly sum could have been enforced as against the owners or occupiers for the time being of the plaintiff's house and premises.

Lastly, I think the case against the plaintiff may be put in this way. The payment of the yearly sum by the occupiers for the time being of her premises was evidence of user by permission. This throws upon her the onus of proving by facts outside and beyond the mere user that the user was "of right" under the statute. This onus she fails to discharge—at any rate she does not do so to my satisfaction. The view that I have taken, while it prevents the operation of the statute in favour of the plaintiff, also negatives the idea that a lost grant can be inferred to support her claim.

For these reasons I think that the appeal ought to succeed, and that the action should be dismissed so far as it seeks a declaration that the plaintiff is entitled to the right of way claimed (not being that claimed in connection with the pump in the pleadings mentioned), and so far as it claims an injunction based on that declaration.

The view I have taken renders it unnecessary for me to consider the further points taken by the defendants, which depend upon the contention at one time put forward by the plaintiff, that she was in the position of a yearly tenant in respect of the user of the way, and upon the payments made by her and received by the defendants before that contention was withdrawn.

Solicitors: *Lovell & Broad; Spencer, Gibson & Co.*

G. I. F. C.

## *In re* BLUNDELL.

C. A.
1901
May 10.

[1900 B. 4918.]
[1901 B. 05.]

*Married Woman—Restraint on Anticipation, Removal of—Increase of Income—Court Investments—Absolute Interest subject to Restraint—Practice—Application for removal of Restraint—Summons—Petition—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict.* c. 41), *s.* 39, *sub-s.* 1.

A married woman entitled absolutely, subject only to a restraint on anticipation of the income during coverture, to the capital of a fund in court standing to her separate account and invested in Court securities, applied, under s. 39 of the Conveyancing and Law of Property Act, 1881, for the removal of the restraint in order that the fund might be paid out to the trustees of her marriage settlement with a view to reinvestment under the wide investment clause therein contained, so as to give her an increased income, the settlement trusts being for herself and her husband successively for life (subject, as to her life interest, to a restraint on anticipation during coverture), with ultimate trusts, in events which had happened, for her sole benefit:—

*Held*, by the Court of Appeal, affirming Farwell J., that mere increase of income was not a sufficient "benefit" to the married woman to justify the Court in removing the restraint so as to enable her to effect a change of investment from Court securities into others of a speculative nature, even though sanctioned by the settlement; and the application was therefore refused.

*Semble*, a married woman's restraint on anticipation may be removed under s. 39 of the Conveyancing and Law of Property Act, 1881, on petition: it is not obligatory to proceed by summons under s. 69, sub-s. 3.

UNDER the will, dated April 11, 1857, of James Blundell, who died on January 15, 1878, Mrs. Margaret Alice Sturrock, a married woman, had, in the events which had happened, become absolutely entitled to certain investments now in court, under the Trustee Relief Act, standing to her separate account, subject only to a restraint on her anticipation of the income during the joint lives of herself and her husband, who was still living.

Upon her marriage a settlement, dated November 27, 1884, was executed whereby trust funds to which, under certain indentures, she was then entitled in reversion expectant on the death of her mother (since deceased) were assigned to trustees

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upon trust to get in and convert the same, and invest the proceeds in any of the investments thereinafter mentioned, and, during the joint lives of herself and her husband, to pay the income thereof to her for her sole and separate use without power of anticipation; and after the death of either herself or her husband to pay such income to the survivor during his or her life; and after the death of such survivor to hold the capital in trust for the children of the marriage as therein mentioned; and in default of children of the marriage the trustees were to hold the capital and income of the trust funds, if the wife survived the husband, for her absolutely, and if the husband survived her, then upon the usual trusts for her appointees by deed or will, or for her next of kin, excluding the husband. The investments authorized by the settlement included Colonial and foreign Government securities, leaseholds for fifty years, bonds, mortgages, debentures, debenture stock, preferential or guaranteed stock or fully paid-up preferential or guaranteed shares of any railway company in Great Britain incorporated by or under Royal Charter or Act of Parliament.

The settlement also contained a power for the trustees, with the consent in writing of the husband and wife or the survivor, to lay out and invest any part of the trust funds, not exceeding 3000*l.* in the whole, in the purchase of a freehold or leasehold house as a residence for the husband and wife and the survivor. And it was thereby agreed that if the wife then was, or during the coverture she or her husband in her right should at one and the same time and from one source become, seised or possessed of or entitled to any real or personal property (except jewels, &c.) of the value of 300*l.* or upwards for any estate or interest, then the husband and wife and all other necessary parties should vest the same in the trustees to be held upon the trusts thereinbefore declared.

The funds in court standing to Mrs. Sturrock's separate account consisted of English and Scottish railway preference stocks, and a small sum of New Consols and also of cash, the whole of the investments being about 20,000*l.* in value, and yielding an income of about 623*l.*

At the time of her marriage Mrs. Sturrock was unable to

settle those funds under her covenant, inasmuch as the events had not then happened under which she had since become absolutely entitled thereto subject only to her restraint on anticipation imposed by the will. She had been married nearly sixteen years, had never had any children, and was past child-bearing, being over fifty-nine years of age. In these circumstances she applied by originating summons under s. 39, sub-s. 1, of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), for an order that the restraint on anticipation imposed by the will of James Blundell might be removed in order that she might be able to take steps to obtain transfer and payment out of court of the investments and moneys standing to her separate account to the trustees of her marriage settlement, in pursuance of the covenant therein contained to settle her after-acquired and other property, to the intent that the same might become bound by the trusts of the settlement.

The application was made by summons upon the authority of the opinion expressed by North J. in *Latham* v. *Latham* (1), but upon the matter coming before Farwell J. in chambers, and upon that case being cited to him, he expressed some doubt upon the decision: however, his Lordship directed that the summons for the removal of the restraint and the necessary petition for payment out should be set down for hearing together. Mrs. Sturrock then presented a petition under the Trustee Act, 1893, asking that the funds in court might be transferred and paid to the trustees of her marriage settlement, so as to give effect to the covenant therein contained. (2)

(1) W. N. (1889) 171.

(2) There seems to be some doubt upon the authorities whether the Court has jurisdiction to make an order under s. 39 of the Conveyancing and Law of Property Act, 1881, upon petition. Sect. 69, sub-s. 3, says that "Every application to the Court shall, except where it is otherwise expressed, be by summons at chambers." In *In re Lillwall's Settlement Trusts*, W. N. (1882) 6, Hall V.-C., held that the Court had no jurisdiction to make an order under s. 39 on petition; and so did North J. in *Latham* v. *Latham*, W. N. (1889) 171. But in *Ex parte Thompson*, (1884) 28 Sol. J. 274, where the application was made by motion, Chitty J., whose attention was called to *In re Lillwall's Settlement Trusts*, said that "s. 69, sub-s. 3, did not impair the jurisdiction of the

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The summons and petition came on together before Farwell J. on February 19, 1901. The grounds alleged by the applicant, Mrs. Sturrock, for the removal of the restraint so as to enable her to effect the transfer, were that her income during coverture would be largely increased in consequence of the range of investment given by the settlement being much wider than that allowed by statute in the case of moneys under the control of the Court; and that under the settlement, as the trusts for children had now become incapable of taking effect, she was, in substance, absolutely entitled to the funds thereby settled, subject only to the life interests of herself and her husband.

The settlement funds consisted of a sum of about 5400*l.* invested in about equal portions in Victoria 3½ per cent. inscribed stock, New Zealand like stock, and Queensland like stock, yielding an income of 191*l.*

The application was supported by an affidavit by Mrs. Sturrock stating that her income was solely derived from the funds comprised in the settlement and will, and that she was desirous that 3000*l.* of the funds in court should be laid out by the trustees of her settlement, under their power, in the purchase of a house as a residence for herself and her husband, and of increasing her income by being allowed to invest the funds in court on the advice and with the consent of her trustees in securities outside those at present allowed by law.

Mrs. Sturrock's solicitor also made an affidavit stating that he had taken the advice of an eminent London firm of stock-brokers upon the subject of a conversion of the funds in court into securities authorized by the settlement, and whether such conversion could be made with advantage to her in the way of income and with due regard to the preservation of the principal; and he exhibited a letter he had received in reply from them, stating that owing to market conditions English and Scottish railway preference stock and other high-class trust

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Court, but was merely directory." And it would seem, from what took place in chambers in the case now reported, that Farwell J. entertained the opinion that an application for the removal of the restraint might properly be made on petition.—G. I. F. C.

securities had during the last year or so depreciated very considerably in value, and were now at a comparatively low price, and that the present was not a favourable time for the conversion required; but that notwithstanding those market conditions a conversion might, even at present, be made with advantage, which would increase Mrs. Sturrock's income by at least 100*l.* a year, while affording security for the preservation of the fund equal to that afforded by the present investments. To their letter the brokers appended a scheme of investment in securities shewing an increase of income to the amount of about 130*l.* This scheme comprised: Eastern Telegraph, 3½ per cent. preference stock; Vickers, Son & Maxim, 5 per cent. preference stock; Buenos Ayres Great Southern Railway (an English limited company), 4 per cent. first debenture stock; Buenos Ayres and Pacific Railway (an English limited company), 4 per cent. first debenture stock; British Aluminium Company, first mortgage 5 per cent. stock; Aboukir Land (Egyptian) Company (an English limited company), 5 per cent. debentures; Furness and Withy Steamship Company, 4½ per cent. first mortgage debentures; and Victoria 3½ per cent. inscribed stock.

By one order made upon the summons and petition Farwell J. refused the application with costs, his Lordship holding that he could not say it was for the benefit of a married woman that she should not be content with the investments which the Legislature and the Court thought were proper for trustees, or that it was really to her advantage that she should have her property invested in speculative securities in order to gain a small increase of income.

Mrs. Sturrock appealed.

The appeal was heard on May 10, 1901.

*Butcher, K.C.*, and *J. Andrew Strahan*, for Mrs. Sturrock. The application is made under s. 39, sub-s. 1, of the Conveyancing and Law of Property Act, 1881, which enacts that "notwithstanding that a married woman is restrained from anticipation, the Court may, if it thinks fit, when it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in any property." We have,

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therefore, to shew that the removal of the restraint in this case is for the lady's benefit. In the first place, no one else but herself is now interested in the funds in court. She is absolutely entitled to them, subject only to this restraint. She is therefore entitled to ask that what is, in substance, her own property may be invested in a manner advantageous to herself by providing an increase of income, which can be done by resorting to the wider range of investments given by her marriage settlement, into which the funds in court can be brought by her performing her covenant to settle her other or after-acquired property. A person absolutely entitled to a fund is not at the present day content with the low rate of interest to be derived from the limited trustee or Court securities; and the securities now proposed are within the investment clause of the settlement, and are recommended by stockbrokers of high standing as perfectly safe investments. The benefit arising to the lady under the proposed scheme lies in greater facility in administration and alteration of investments, and in increase of income with sufficient security of capital. The release of the restraint is not required to enable the married woman to expend capital in payment of her debts, though that has been not uncommonly done. There have even been cases where the Court has actually destroyed the capital by allowing it to he laid out in the purchase of an annuity for the married woman. *Re Currey* (1) and *In re Wright's Trusts* (2) are instances in which the Court has removed the restraint where the married woman is absolutely entitled. Not only will the removal of the restraint in this case operate for the lady's benefit, but, having regard to her absolute interest, effect should be given to her desire to have these funds brought into her marriage settlement so as to provide a future life interest thereunder for her husband.

*Gordon Fellowes*, for the trustees of the will and settlement.

*R. J. Parker*, for other parties.

COLLINS L.J. This is an appeal from an order of Farwell J., who has refused to remove the restraint on anticipation imposed

(1) (1887) 56 L. T. 80. (2) (1885) 15 L. R. Ir. 331.

upon a married woman and so enable her to obtain a fund out of court and invest it as she may be advised. It seems to us, after carefully considering the arguments that have been addressed to us on her behalf, that no case has been made out which would justify us in interfering with the order of Farwell J. It is clear that we could not make such an order as is asked for by the lady unless we were satisfied that it was for her benefit. She suggests that it is for her benefit in two ways. In the first place, she says she would get a larger income from the fund if it were paid over to her or her trustees than if it remained in the custody of the Court. That is a ground very frequently adduced to the Court in such cases. When a person is entitled to or interested in investments in court consisting of such securities as are approved by the Court in the case of money under its control, the most substantial motive in an application of this kind is to obtain a possible increase of income by investing the money in a manner which may occasion some risk—it may be small or great—to the capital. It is true that in the present case the lady is (subject to this restraint on anticipation) herself the owner of the fund, and there is no one else to be consulted with respect to its disposition. There is this also put forward as a ground for our making the order—that she proposes, if the restraint is removed, to give effect to the covenant in her marriage settlement to bring after-acquired property into the trusts of that settlement. If she did that, the money would become subject to a settlement in which the powers of investment embrace a wider range of securities than this Court sanctions for moneys under its control.

We must approach this question in view of the long line of authorities which have laid down that the restraint on anticipation was introduced for good and sufficient reason, and the presumption must be that it was properly introduced. Is it a sufficient ground for interfering with that restraint in the present case that the lady wishes to increase her income by changing the fund from investments of which the Court does approve for funds under its control to investments of which the Court would not approve for such funds? Has the lady made out that such a change of investments would be for her

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benefit? It seems to me that the benefit to her of thereby obtaining a larger income would be bought at the expense of a greater risk to the capital; and I cannot say that the materials before us with regard to the investments submitted through the brokers—though, no doubt, they are gentlemen of high standing and respectability—and even taking their view as to the securities which they mention, afford sufficient evidence to warrant us in saying that a change of investments such as she wishes would be for the benefit of the lady.

Then as to the carrying out of what she considers a moral obligation upon her, I think that is somewhat subordinated to the primary object of getting a larger income. No doubt she is desirous, if she gets these funds, of bringing them into settlement, so that her husband would have the benefit of them after her death; but on the whole I think that Farwell J. was right, and that we cannot interfere with the exercise of his discretion by holding that a case has been made out of such predominant benefit to the lady as warrants us in removing the restraint from the fund which has been imposed for good reason and primâ facie for her advantage. I think, therefore, that the appeal must be dismissed.

STIRLING L.J. I am of the same opinion. The applicant is a married lady who is entitled absolutely to a fund in court subject only to a restraint on anticipation during the joint lives of herself and her husband. Upon her marriage she made a settlement, which contained a covenant on her part to settle after-acquired property; and that settlement contains a power of investment that allows a larger range of selection than the Court allows for cash under its control, and larger even than that enjoyed by trustees under the Trustee Act, 1893. The fund is at present invested mainly in railway preference stocks, but there is also a small sum of Consols. These investments yield an income of a little over 600*l.*, and what the lady desires is that under s. 39 of the Conveyancing and Law of Property Act, 1881, the Court should bind her interest in this property in such a way that for one moment it may become hers absolutely, free from the restraint on anticipation, and so be subject to the

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covenant in her settlement. The effect of that would be that it would again become subject to a restraint on anticipation, and would also be subject to the life interest of her husband. The lady is now fifty-nine, and there are no children who can take any interest under the settlement, and there is no person entitled in remainder thereunder but herself. The question is whether the Court can say that it is for her benefit, within the meaning of s. 39, that what she wishes should be done. Now, a good deal has been said—and it is a matter to be regarded, I quite admit—as to the fact that the lady is all but mistress of this property. Still, I apprehend that, however much she may think it is for her own benefit that the investments should be changed, the Court will not simply hand over the fund to herself. In fact that was laid down by Chitty J. in *Re Currey*. (1) The observations he made in that case I think deserve to be read. Of s. 39 he says this: "The section is in general terms, and the Court must hold, in order to allow a married woman to bind her interest, that it will be for her benefit. It must appear to the entire satisfaction of the Court to be for her benefit so to do. If I were simply asked to allow a married woman to convey her property where there is a restraint on anticipation and nothing more, and that were the whole case, I should decline to do it. Each case requires careful attention, in order to see that the transaction is one which will be beneficial to the married woman." That is the general principle we have to apply here. Now, the lady does not, it is true, ask that the fund may be handed over to herself, but she asks that it may be vested in herself for one moment in order that it may be handed over to the trustees of her settlement so that they may exercise the wide powers of investment they possess under the settlement. She has consulted a firm of stockbrokers, and there has been put in evidence a scheme contained in a letter from them, in which they suggest that notwithstanding the present condition of the market being such that high-class securities have depreciated, yet a change of investment might be made which would increase her income by at least 100*l*. a year; and they set out a list of securities in which

(1) 56 L. T. 80, 82.

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they propose that the money might be invested. This is really the main object of the scheme, namely, to secure a larger income; and I can only say that, looking at the proposed scheme and the list of securities in it, I am not satisfied that it would be wise to act upon it, or that it would be beneficial to the lady. It is for her to make out that it would be for her benefit: possibly the scheme may be for her benefit; but I should not myself act upon the opinion of these brokers (who are, no doubt, persons of respectability) without further inquiry and without proper evidence. That being so, I am not satisfied that we ought to put the section in operation by removing the restraint upon anticipation.

As to the other matter, the obtaining control of the fund so as to give effect to the covenant in the settlement, that seems to be a very minor matter; and, in the view I take, I cannot differ from Farwell J.

This appeal must therefore be dismissed.

Solicitors: *S. F. & H. Noyes; Norris, Allens & Chapman.*

G. I. F. C.

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[1899 T. 235.]

C. A. 1901 *Feb.* 8, 11, 12, 18; *April* 1.

# LONDON AND COUNTY BANKING COMPANY *v.* NIXON.

[1900 L. 928.]

*Trustee and Cestui que Trust—Breach of Trust—Solicitor Trustee—Fraud—Appropriation—Entries in Books—Declaration of Trust—Mortgage—Leaseholds—"Interest in Land"—Equitable Incumbrancers—Priority—Innocent Trustee Mortgagee—Legal Estate—Title-deeds, Possession of—Purchaser for Value without Notice—Legal Estate acquired by Mortgagee after Notice of Trust—Joint Tenancy—Conveyance by one Joint Tenant—Severance—Equitable Title—Legal Title—Relation back—Notice, Express or Constructive—Solicitor and Client—Notice through Solicitor—Purchaser Mortgagee—General Inquiry as to Incumbrances—Liability of Vendor to answer—Conveyancing Act*, 1882 (45 & 46 *Vict. c.* 39), *s.* 3, *sub-s.* 1 (*i.*) *and* (*ii.*).

In 1882 T., a solicitor, advanced money of his own upon the security of leaseholds mortgaged to him by sub-demise.

In 1889, being then one of the two trustees of the B. settlement, he received a sum of money belonging to the settlement, and, without the knowledge of his co-trustee, fraudulently applied it to his own use. By entries in his books, under the heading of the trust, he purported to appropriate his own mortgage debt to answer the sum of which he had defrauded the trust estate, but he never communicated the purported appropriation either to his co-trustee or to his cestuis que trust, all of whom were sui juris.

In 1896 the appropriation became known to one of the cestuis que trust, who was a solicitor and acted as such for the others, but although they had all become absolutely entitled in possession to the trust funds they never called upon the trustees to transfer them and no inquiry was made respecting the mortgage.

In 1889 T. was also a trustee of the T. settlement. In 1895, T. having then become sole trustee of that settlement, N. was appointed co-trustee, and at N.'s request, on T.'s representation that the trust funds included the above-mentioned mortgage debt and securities, the representation being supported by his production to N. of the deeds, T. executed a legal transfer thereof into the joint names of himself and N., N. being then totally ignorant of the existence of the B. settlement and of T.'s secret appropriation thereto. The deed of transfer had been prepared by T. as

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solicitor to the T. trust, and the mortgage and other title-deeds remained in his custody as such solicitor.

In 1897 T., without N.'s knowledge, deposited the deeds with his bankers as security for a debt due from him to them, at the same time executing to them a deed-poll by which he charged the debt upon all his estate and interest in the property comprised in the deeds, and undertook to execute, on request, a legal mortgage; and he thereby declared that during the continuance of the security he would hold all his interest thereby charged in trust for the bank as mortgagees; and he appointed three officers of the bank his attorneys for him and on his behalf, and as his act and deed, to execute any such legal mortgage as aforesaid. At that time the bank had no notice of either of the two settlements.

In March, 1898, T. absconded, and in April, 1898, notice was given to the bank of the T. settlement, but they had no notice of the B. settlement. Notwithstanding the notice, the bank purported to execute to themselves by their three officers as T.'s attorneys under the deed-poll a legal mortgage of the leaseholds comprised in the deposited deeds.

In actions to ascertain the priorities of the B. settlement, the T. settlement, and the bank to the benefit of the mortgage debt and securities:—

*Held*, by Vaughan Williams and Stirling L.JJ. (Rigby L.J. dissenting), that there was a good appropriation in 1889 in favour of the B. settlement, though not communicated by T. either to his co-trustee or to his cestuis que trust: *Middleton* v. *Pollock*, (1876) 2 Ch. D. 104; *New, Prance & Garrard's Trustee* v. *Hunting*, [1897] 2 Q. B. 19, affirmed sub nom. *Sharp* v. *Jackson*, [1899] A. C. 419:

But *held* by the full Court that, assuming there was a good appropriation in favour of the B. settlement, N., as trustee of the T. settlement, and having no notice of the appropriation, could not be deprived of the advantage acquired by him as against the B. settlement by the possession of the legal estate in one moiety of the mortgage debt and securities and of the better right to the legal estate in the other moiety which had become vested in the bank through T.'s mortgage to them operating as a severance of the joint tenancy between himself and N.; and that N. must be treated as an innocent purchaser for value without notice, on the ground that by accepting the transfer of the mortgage debt and securities he gave up his right to sue T. for the debt due to the T. settlement: *Thorndike* v. *Hunt*, (1859) 3 De G. & J. 563; *Taylor* v. *Blakelock*, (1886) 32 Ch. D. 560: also that N. was protected by s. 3, sub-s. 1 (i.) and (ii.), of the Conveyancing Act, 1882, from being affected with constructive notice of the appropriation to the B. settlement, because (1.) no possible inquiries or inspection by N., or any independent solicitor on his behalf, would have brought the appropriation to the B. settlement to his knowledge, and (2.) the appropriation did not "come to the knowledge of" T. either as N.'s solicitor or "in the same transaction in respect to which the question of notice arose":

*Held*, also, that inasmuch as the bank had, at the date of the mortgage to them in April, 1898, notice of the T. settlement, they could not be

allowed to gain priority over that settlement by means of the legal estate they had acquired in an undivided moiety of T.'s mortgage debt and securities, their mortgage not relating back to the date of the deed-poll of 1897. Consequently:

*Held*, that N., as trustee of the T. settlement, was entitled to the mortgage debt and securities in priority to both the B. settlement and the bank, and the bank was ordered to reconvey to him as such trustee the legal estate vested in them, and to deliver up the deeds accordingly.

Although a mortgage debt is a chose in action, yet, where the subject of the security is land, the mortgagee is treated as having "an interest in land," and priorities are governed by the rules applicable to interests in land, and not by the rules which apply to interests in personalty: *Jones* v. *Gibbons*, (1804) 9 Ves. 407, 410; 7 R. R. 247, 250; and leaseholds are real estate for the purposes of the rule: *Wiltshire* v. *Rabbits*, (1844) 14 Sim. 76; *Union Bank of London* v. *Kent*, (1888) 39 Ch. D. 238.

*Quære*, whether, when the estates of a prior and subsequent incumbrancer are both equitable, the rules as to postponement, in *Northern Counties of England Fire Insurance Co.* v. *Whipp*, (1884) 26 Ch. D. 482, are not excluded: see *Taylor* v. *Russell*, [1892] A. C. 244, 262.

The positions discussed and considered (*a*) of a legal mortgagee making an advance without notice of a prior equitable title: (*b*) of an equitable mortgagee making an advance without notice of a prior equitable title and subsequently getting in the legal estate either with or without notice (as the case may be) of the prior equity: (*c*) of an equitable mortgagee who has allowed his mortgagor, or some person standing in a fiduciary relation to him, the mortgagee, to retain possession of the title-deeds so that they ultimately come into the hands of a subsequent equitable incumbrancer: and (*d*) of a purchaser for value of an equitable title without notice, as regards his right to call for the legal estate.

APPEALS against two judgments of Farwell J. as to the priorities of the parties to the action with regard to certain mortgages.

The questions in dispute arose out of frauds committed by Frederick Talbot Tasker, a solicitor, who was a member of the firm of Talbot & Tasker.

On February 1, 1882, Tasker out of his own moneys advanced to Richard Ward the sum of 1400*l.*, on the security of four indentures of mortgage by which four leasehold houses, known respectively as Nos. 14, 15, 16, and 18, Park Terrace, Kensal Road, Middlesex, were respectively assured by way of sub-demise to Tasker, as security for 350*l.* each and interest at 5 per cent.

In December, 1889, Tasker and Charles William Chubb were the trustees of a settlement dated April 12, 1850, and made on the marriage of a Mr. R. T. Brockman, and hereinafter called

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the "Brockman settlement." In that capacity Tasker received on behalf of himself and his co-trustee a sum of 1000*l.*, which had been invested on a mortgage given by Messrs. King & Brown, who had paid it off. 700*l.*, part of that sum, Tasker applied to his own use. In respect of it he paid to the beneficiaries under the Brockman settlement half-yearly the sum of 17*l.* 10*s.* (less income tax) by way of interest. In Tasker's private books of account, under the heading "Trustees of R. T. Brockman, income account," the interest on the 1000*l.* lent to King & Brown was entered half-yearly, down to February, 1889, as "By half-year's interest 1000*l.*, King & Brown." Opposite the last entry of this kind was a pencil memorandum, "now 700*l.*, Ward."

Subsequently to 1889 the half-yearly payments of interest were entered, in most cases, "By half-year's interest on 700*l.*, Ward," though in the year 1891 the entries were, "By half-year's interest on 700*l.*" Some of the earlier entries were, in the opinion of the Court, open to suspicion as alterations had been made in them, but those made in 1893 and following years were apparently free from suspicion. Farwell J. held that, although Tasker had executed no formal declaration of trust, and, still less any legal assignment of the mortgages or any of them, nevertheless these entries established that previously to 1895 Tasker had appropriated 700*l.*, part of the mortgage debt of 1400*l.* due to himself from Ward, to answer the 700*l.* which he had taken from the Brockman settlement funds. It did not appear that this appropriation was ever communicated by Tasker to his co-trustee, C. W. Chubb. Further, there was no evidence that the beneficiaries ever heard of the above entries, or that the appropriation was communicated to any of them previously to 1896; but in that year it became known to one of them, Mr. Brockman, a solicitor, who acted as such on behalf of the others. All these beneficiaries were, in 1889 and subsequently, sui juris, and entitled to absolute interests in possession in the trust funds, but they nevertheless did not call upon the trustees to transfer them. Mr. Brockman, moreover, made no inquiries on the subject of the 700*l.* mortgage, and the explanation he gave to the Court

was this: "I did not suspect anything wrong, and I had no occasion to. It was the trustee's responsibility, and I did not think there was anything wrong." It was, in the opinion of the Court, to be inferred that Mr. Brockman did nothing to relieve either trustee from any responsibility which he had incurred.

In December, 1889, F. T. Tasker and John Karslake Blake were the trustees of another settlement, dated April 18, 1873, and made on the marriage of F. T. Tasker's brother, William Tasker, hereinafter called the "Tasker settlement." Blake died on July 18, 1890, and thenceforth, until February, 1895, F. T. Tasker was the sole trustee of this settlement. In that month Mr. Samuel Nixon was invited to become co-trustee with F. T. Tasker of the Tasker settlement. Thereupon Nixon inquired of F. T. Tasker what the funds subject to the trusts were; and Tasker then furnished him with a list in which he included, as one of the investments, "1400*l.* lent to Mr. Ward on mortgage of houses in Park Terrace, Kensal Road." Nixon subsequently went to F. T. Tasker's office and requested to see the securities for this sum, when there were produced to him the four leases and mortgages, and he required that on his appointment as trustee these should be transferred into the joint names of Tasker and himself, which Tasker agreed should be done. Nixon then consented to become a trustee of the Tasker settlement, and he was accordingly appointed trustee by a deed which bore date February 25, 1895, but appeared to have been executed later. In June, 1895, transfers of the four mortgages standing in Tasker's name were executed by him vesting the legal estate in the mortgages in the joint names of himself and Nixon. Whether these transfers were executed by Nixon also was unknown, for they had since disappeared and could not be found. Nixon was at the time totally ignorant of the existence of the Brockman settlement or of Tasker's appropriation to that settlement. All the transactions relating to the Tasker settlement took place before the appropriation in favour of the Brockman settlement was communicated to the beneficiaries under that settlement.

The four leases and mortgages remained in the possession

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of F. T. Tasker, and he on August 14, 1897, deposited them with his bankers, the London and County Banking Company, as security for an overdrawn account. On the same day he, at their request, executed under seal a memorandum or deed-poll, on a printed common form supplied by them, which was headed with a direction that the form was to be used only in cases where security was given by a single member of a firm for the debt of the firm, but stating that it covered also the private account of the partner giving the security.

This memorandum or deed-poll was addressed to the banking company. By it F. T. Tasker, therein described as a member of the partnership firm of Talbot & Tasker, declared that he had deposited with the bank the deeds and documents mentioned in the schedule thereto as a security for the payment of all moneys for the time being due or owing to the bank from the firm, or from himself individually, on any account whatsoever. And he thereby undertook that the firm, or one of the partners thereof, would pay to the bank on demand in writing all such of the said moneys as should for the time being be actually due. "And by this deed I charge all my present and future estate and interest, both legal and equitable, in all the hereditaments and other property comprised in the said deposited deeds and documents, and all money which may or but for these presents might become payable to me or my representatives or assigns by virtue of any sale, further mortgage, or charge which I or any person claiming under me may make of or on the same, or any part thereof or interest therein, with payment of the same moneys on demand. And I declare that you shall accordingly be deemed mortgagees under this deed of all the said premises hereby charged. And I undertake that I and all other necessary parties (if any) will on any request for this purpose . . . . make, execute, and deliver to you, or to such person or persons as you may appoint, such further valid legal or other mortgage or mortgages by deed or otherwise of the premises hereby charged as you may require. . . . And I declare that during the continuance of the present security I will hold all my present and future estate and interest hereby charged in trust for you as such mortgagees thereof as afore-

said, and will convey the same as you shall direct. . . . And I hereby irrevocably appoint Henry Dean, your present head office manager, William Hall, your present chief accountant, and Josiah Blaylock James, your present country manager, and every two and one of them, or the persons for the time being holding the said respective offices, and every two and one of them . . . . jointly and severally my attorneys and attorney for me and on my behalf, and as my act and deed, to make, execute, and deliver every or any such further mortgage or mortgages as aforesaid, or (without executing any such mortgage) to make, execute, and deliver any conveyance of all my present and future estate and interest in the said hereditaments and premises, or any part thereof, to any purchaser or purchasers thereof on a sale by you as mortgagees."

The schedule to the deed-poll specified the leases of the four houses, Nos. 14, 15, 16, and 18, Park Terrace, Kensal Road, to Richard Ward, and a mortgage of each house by Ward to F. T. Tasker to secure 350*l*., making altogether 1400*l*.

It appeared that the bank did not at that time desire to have the legal estate in the securities conveyed to them, as they considered that the effect of a conveyance would be to render them liable to the covenants in the leases.

On March 26, 1898, F. T. Tasker, who had absconded, was adjudicated a bankrupt.

On April 5, 1898, the officers of the bank, as attorneys for and in the name of Tasker, executed a deed, by which it was expressed that, in consideration of the moneys then owing to the bank on the security of the deed of August 14, 1897, Tasker thereby assigned, and as beneficial owner thereby conveyed, to the bank the several principal sums owing on the security of the said several mortgages, and all interest then due and thenceforth to accrue due thereon, and the benefit of all securities for the same, and of all powers, including the statutory power of sale and remedies thereby conferred, to hold the same unto the bank, their successors and assigns, subject to redemption. And for the consideration aforesaid Tasker thereby granted, and as beneficial owner conveyed, unto the bank all the hereditaments and premises comprised in the said mortgages, to hold

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the same unto the bank, their successors and assigns, for all the residue then to come and unexpired of the several terms of years for which the same were then vested in Tasker by virtue of the said several mortgages. Then followed a proviso for reassignment by the bank on payment to them of the moneys secured by the deed of August 14, 1897.

When the deed of August 14, 1897, was executed the bank had no notice of the title either of the Brockman trustees or of the Tasker trustees. They had also taken the precaution of searching the Middlesex Registry, but found no record of any incumbrance on Tasker's title. But before April 5, 1898, the date of the conveyance to them, the bank had acquired notice of the title of the Tasker trustees, but not of that of the Brockman trustees.

In August, 1898, Charles Hewlett Taylor was appointed a trustee of the Brockman settlement in the place of F. T. Tasker, and with Charles William Chubb.

In February, 1899, Charles William Chubb retired from the Brockman trust, and William Lindsay Chubb was appointed a new trustee in his place, jointly with Taylor.

On February 6, 1899, Taylor and W. L. Chubb, as such trustees, commenced the first above-mentioned action against the bank, Nixon and F. T. Tasker, claiming to have the mortgages and deeds transferred to them as security for 700*l.* and interest, or in the alternative to have the rights and priorities of all parties ascertained and determined.

At the trial of this action it appeared, as already stated, that the transfers to Tasker and Nixon of the four mortgages had been lost, and, although searched for, could not be found. Nixon accordingly failed on that occasion to prove their execution by Tasker, and by the judgment of Farwell J., dated March 19, 1900, it was declared that the plaintiffs were entitled to a charge in respect of the sum of 700*l.* and interest on the sum of 1400*l.* secured by the four mortgages, and that the 700*l.* and interest had priority over the claim of Nixon and Tasker as trustees of the Tasker settlement, but that the plaintiffs took their charge subject to the deed of charge of August 14, 1897, and the deed of April 5, 1898, in favour of the bank.

On April 25, 1900, the bank commenced the second above-mentioned action against Nixon and Richard Greswell (who had meanwhile been appointed in place of Tasker a co-trustee with Nixon of the Tasker settlement), thereby claiming a declaration that they, the bank, were entitled to hold the four mortgages as security for the debt due to them from Tasker in priority to the charge of the defendants.

The defendants counter-claimed for priority over the bank.

At the trial of this second action the defendants, the trustees of the Tasker settlement, succeeded in proving the execution of the transfers of the mortgages by Tasker to himself and Nixon; and by the judgment of Farwell J., dated July 27, 1900, the bank's action was dismissed, and upon the counter-claim it was declared that the defendants' charge was entitled to priority over the charge of the bank; and it was ordered that the bank should hand over to the defendants the deeds and documents included in the deed of August 14, 1897.

From the judgment in *Taylor* v. *London and County Banking Co.* two appeals were brought.

The first was by the defendant Nixon, who claimed a declaration that he and F. T. Tasker, as trustees of the Tasker settlement, were entitled to the 1400*l.* secured by the four mortgages in priority to the claims of the trustees of the Brockman settlement and the bank. Upon the hearing of this appeal further evidence was by the leave of the Court adduced proving the execution of the transfers to Tasker and Nixon.

The second appeal was by the plaintiffs, the trustees of the Brockman settlement, who claimed that their charge had priority over that of the bank. They also served a cross-notice to the like effect in Nixon's appeal.

From the judgment in *London and County Banking Co.* v. *Nixon* an appeal was brought by the bank, who claimed priority over the defendants Nixon and Greswell.

The two appeals in *Taylor* v. *London and County Banking Co.* were heard on February 8, 11, and 12, 1901.

Upon the opening of the appeal by Nixon, the execution of the transfers to himself and Tasker were proved by secondary evidence. Tasker's former conveyancing clerk, on being called

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for the purpose, produced completed drafts of the transfers, which he stated had been prepared by himself. He also proved the engrossment of the deeds from those drafts for execution, and the due execution of the deeds by Tasker, the clerk himself being the attesting witness. Then he proved the stamping, and deposed that, upon the deeds being thus completed, they were returned to Tasker's custody. Upon this evidence the Court of Appeal held that the four mortgages had been legally transferred to and had thus become vested in Tasker and Nixon as joint tenants, and the hearing of the several appeals in both actions proceeded upon that footing.

A question arose as to the precise relations between F. T. Tasker and Nixon—whether from the time of the appointment of the latter as a trustee of the Tasker settlement the relation of solicitor and client subsisted between them; but in his evidence before Farwell J., Nixon stated positively that he never was a client of Tasker's; that he had never retained Tasker as his solicitor; that Tasker acted merely as solicitor to the Tasker trust, and was paid for all work done in the matter of the trust out of the trust funds alone and not by him, Nixon, personally.

*Badcock*, *K.C.*, and *E. Ford*, for the defendant Nixon. It has now been proved that the legal estate in the four mortgages was duly vested in Tasker and Nixon, as the trustees of the Tasker settlement. Thus Nixon is in the position of holder of the legal estate as purchaser for value, and without notice of the Brockman settlement, for Tasker never informed him of the appropriation of the securities to make good the sum taken from the Brockman settlement. A person who has committed a fraud is not to be deemed to have communicated it to another, and therefore no constructive notice can be imputed to Nixon. Constructive notice depends upon a presumption, so strong that it cannot be allowed to be rebutted, that knowledge must of necessity have been communicated: *Hewitt* v. *Loosemore*. (1) Assuming there was a good appropriation to the Tasker trustees in 1889, the appropriation

(1) (1851) 9 Hare, 449, 454, 455.

remained good in 1895, when Nixon became trustee and was furnished with a list of the Tasker trust funds.

[*Levett, K.C.* I do not dispute that, so far as an appropriation could be made, it was made; but my contention is that the charge of the Brockman trustees takes precedence of the charge in favour of the Tasker trustees.]

Assuming, then, that there was a valid appropriation in favour of the Tasker trustees, Nixon, having by accepting the transfers given up his right to sue Tasker for his debt to the Tasker trust, is entitled to be treated as an innocent purchaser for value without notice, and to retain the transferred securities as part of the Tasker settlement funds: *Taylor* v. *Blakelock* (1); *Thorndike* v. *Hunt*. (2)

[RIGBY L.J. How do you shew Nixon's acceptance of the transfers?]

We can only shew it by his having required and insisted that the securities should be transferred into the joint names of himself and Tasker, which was done. Whether he actually executed the transfers we do not know, as the deeds are lost.

[STIRLING L.J. In *Taylor* v. *Blakelock* (1) the whole legal estate got into the innocent trustee, he having survived the fraudulent trustee.]

That, we submit, makes no difference. Tasker has absconded, and for all we know he may have died and Nixon may be the survivor. However that may be, the right of the innocent trustee cannot depend upon the order in which the trustees die. By allowing himself to be appointed trustee and stipulating for the transfer to himself and Tasker, Nixon altered his position, and thereby gave up the rights he would otherwise have had against Tasker to sue him for the 1400*l.* for which he, Tasker, was accountable to the Tasker settlement. His purchase for value having been bonâ fide, the Court will not, in the absence of any superior equity, deprive him of the advantage he has obtained by the possession of the legal estate: *Pilcher* v. *Rawlins* (3); *Rooper* v. *Harrison* (4); Dart on Vendors and Purchasers, 6th ed. pp. 929, 931, 932.

(1) 32 Ch. D. 560, 568.
(2) 3 De G. & J. 563.
(3) (1872) L. R. 7 Ch. 259, 268–9.
(4) (1855) 2 K. & J. 86, 108.

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*Levett, K.C.*, and *G. Cave*, for the plaintiffs, the trustees of the Brockman settlement. Our priority in time over the Tasker settlement is not displaced by reason of the trustees of that settlement having acquired the legal estate, and for the following reasons. First, the legal estate was in two joint tenants, and as one of them had notice of our settlement, that operated as notice to both, joint tenants being seized per mie et per tout: *Freeman* v. *Laing* (1); *Jones* v. *Badley* (2); *Rowbotham* v. *Dunnett* (3); *Russell* v. *Jackson*. (4)

[*Badcock, K.C.* The last three cases relate only to secret charitable trusts: the authorities are collected in 1 Jarm. on Wills, 5th ed. p. 194.]

But the principle established is that "no person can claim an interest under a fraud committed by another. However innocent the party may be, if the original transaction is tainted with fraud, that taint runs through the derivative interest, and prevents any party from claiming under it": per Turner V.-C. in *Russell* v. *Jackson*. (5) So here, Nixon, one of two trustees, is seeking to take advantage of the legal estate acquired through the fraud committed by his co-trustee. In these circumstances the whole of the legal estate, or at least half, must be treated as held in trust for the parties claiming under the Brockman settlement.

[VAUGHAN WILLIAMS L.J. referred to *Wallace* v. *Kelsall*. (6)]

Secondly, Tasker, in acting as solicitor to the Tasker trust, was in effect acting as solicitor to Nixon; therefore Nixon must be treated as affected with constructive notice of all the facts through his solicitor, Tasker, to whom he admittedly left everything; he was affected by the knowledge Tasker himself had: *Dixon* v. *Winch* (7); *Boursot* v. *Savage* (8); Dart on Vendors and Purchasers, 6th ed. pp. 990, 992. In such a case the solicitor is the client's alter ego, and the solicitor's knowledge is the client's knowledge. We submit, therefore, that Nixon had constructive notice of all the fraud and of all the

(1) [1899] 2 Ch. 355, 358, 359.
(2) (1868) L. R. 3 Ch. 362, 363–4.
(3) (1878) 8 Ch. D. 430.
(4) (1852) 10 Hare, 204.
(5) 10 Hare, 212.
(6) (1840) 7 M. & W. 264.
(7) [1900] 1 Ch. 736, 748.
(8) (1866) L. R. 2 Eq. 134, 141–2.

equities; and that, having such constructive notice, he is bound to convey to the Brockman trustees at least one-half, if not the whole, of the legal estate.

[STIRLING L.J. What do you say to s. 3, sub-s. 1, of the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), which places a restriction on the doctrine of constructive notice? (1)]

The section does not, we submit, protect Nixon. He cannot claim protection under sub-clause (i.), for if he had had an independent solicitor, inquiries would have been made which might have led to the discovery of the fraud, though we admit he could not have actually compelled an answer: *In re Ford and Hill.* (2) Also under sub-clause (ii.) he was bound to make inquiry into his title.

*Warmington, K.C., Bramwell Davis, K.C.*, and *Edward Chitty*, for the defendants, the London and County Banking Company. We, the bank, have acted with perfect bona fides. We took a charge from Tasker in the form of a memorandum under seal, containing a distinct contract for the conveyance of the legal estate, and appointing attorneys for that purpose to act on behalf of Tasker. Tasker produced the deeds to us, and we took the precaution of searching the Middlesex Registry. Thus we were led to believe that he was the person who had the legal estate. First, quite apart from any question of notice, it is clear from *Boursot* v. *Savage* (3) that the effect of the conveyance to the bank in 1898 was to transfer to them the legal estate in one moiety of the houses; for a conveyance by one of two joint tenants operates to sever the joint tenancy, and the assignee of that joint tenant becomes tenant in common

(1) Sect. 3 of the Conveyancing Act, 1882, provides (sub-s. 1) that "A purchaser"—which includes a "mortgagee" (s. 1, sub-s. 4 (ii.))—"shall not be prejudicially affected by notice of any instrument, fact, or thing unless—(i.) It is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or (ii.) In the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent."

(2) (1879) 10 Ch. D. 365.

(3) L. R. 2 Eq. 134.

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with the other original joint tenant. We are thus entitled to priority to the extent of a moiety. Secondly, assuming that the Brockman trustees are able to displace, to the extent of 700*l.*, the priority of the Tasker trustees to the legal estate, we claim priority over the Brockman trustees, because the Brockman trustees did nothing: they never asked for the deeds or made any inquiry about them; whereas we did everything, for we demanded and got actual possession of all the deeds. In a question of priorities, it is the person who exercises reasonable care and obtains possession of the deeds who obtains the priority. Further, although the beneficiaries under the Brockman settlement had become absolutely entitled, and could therefore require the mortgages to be transferred into their names, they did nothing: they never asked for the deeds, but relied entirely on Tasker. That is negligence, for the deeds were allowed to remain in the hands of Tasker, notwithstanding that he was in the position of mortgagor to the Brockman settlement, and thus he was placed by the persons interested under that settlement in a position enabling him to commit a fraud. Then, as regards our position when Tasker deposited the deeds with us in August, 1897, when we had no notice of either settlement, the law is that the possession of deeds by an equitable incumbrancer gives priority to an earlier equitable incumbrancer, where the omission by the earlier incumbrancer to obtain possession of them is not satisfactorily accounted for: *Rice* v. *Rice* (1); *Farrand* v. *Yorkshire Banking Co.* (2) Therefore, as against the Tasker trustees, we are entitled to priority as having the better equity, and that priority will entitle us to be subrogated to the rights of the Brockman trustees, and to take their place and come first to the extent of 700*l.*: *In re Lord Kensington* (3); *In re Wyatt* (4); *Benham* v. *Keane.* (5)

*G. Cave*, in reply, for the plaintiffs, the Brockman trustees. The Court cannot decide the question of subrogation until the priority as between the Tasker trustees and the bank has been ascertained in the other pending appeal. If, under that other

(1) (1853) 2 Drew. 73, 80–3.
(2) (1888) 40 Ch. D. 182.
(3) (1885) 29 Ch. D. 527.
(4) [1892] 1 Ch. 188, 208–9.
(5) (1861) 1 J. & H. 685; 3 D. F. & J. 318.

appeal, it is decided that the Tasker trustees come first, we should contend that we come before them. As to the charge of negligence against us, there is no evidence to support it.

[VAUGHAN WILLIAMS L.J. Did the Brockman trustees know of the incumbrance created in their favour by Tasker by the appropriation of the mortgage securities to the 700*l.* due from him to them?]

There is no evidence of that. Even supposing they did, there is no negligence in taking a security in the name of a trustee, or in leaving the title-deeds in the hands of the mortgagor, sufficient to postpone the mortgagee to a person advancing money to the mortgagor on a deposit by him of the deeds. After the appropriation the mortgage was, in effect, a contributory mortgage as to 700*l.* for the Brockman beneficiaries, and as to the balance for Tasker; and there is no negligence in taking a contributory mortgage in the name of a third person, or in the name of a trustee, and leaving the deeds with him: *Bradley* v. *Riches* (1); *Carritt* v. *Real and Personal Advance Co.* (2) We were not aware that the mortgage had been taken in Tasker's own name. He led us to believe that it was one of the securities of the Brockman trust: he was a trustee, and we had no reason to distrust him. There was no duty on our part to insist on keeping a watch upon Tasker; and it was not our duty, nor was it in accordance with the usual practice, to indorse the deeds with any notice of the trust. Tasker was solicitor as well as trustee; and leaving title-deeds with a solicitor is not in itself negligence so as to postpone a prior mortgagee to a subsequent mortgagee without notice: *Cook* v. *Bramwell.* (3) Negligence is not in fact alleged in the pleadings. The power of attorney under which the officers of the bank purported to convey the legal estate to the bank was in itself bad, for a trustee, such as Tasker was, cannot appoint an attorney to convey away the trust property.

*Badcock, K.C.*, in reply, for the defendant Nixon. With regard to the first point made on behalf of the Brockman trustees—that notice to one of two joint tenants is notice to

(1) (1878) 9 Ch. D. 189. (2) (1889) 42 Ch. D. 263.
(3) W. N. (1890) 72.

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both—*Freeman* v. *Laing* (1), which was cited in support of that proposition, was a case of rival equities. I agree that if equities only are being discussed, notice to one of two trustees is sufficient; but here we start with the fact that the actual legal estate is in Nixon, and that cannot be got rid of. To say that, because trustees are seised per mie et per tout, therefore the knowledge of a fact by one of them involves the knowledge of it by the other, is absurd. It is impossible to say that, because Nixon was a joint tenant with Tasker, therefore he must be taken to have known of the fraud of his co-joint tenant. The doctrine of constructive notice cannot be so mixed up with that of express notice, of which, it is admitted, there was none in this case. The other cases cited in support of the plaintiffs' first point were cases of wills creating secret trusts, and depended upon the principle that a man who has accepted a secret trust cannot claim contrary to it. They deal with the rights of volunteers claiming under a will, and have nothing to do with the case, such as this, of a purchaser for value without notice and in possession of the legal estate. Then it is said that Nixon is trustee of at least a moiety for the persons interested under the Brockman settlement. How can a trustee for persons entitled under his settlement be a trustee of his trust estate for any one else? Nixon and Tasker took as trustees for the Tasker trust. How can it be said that the trust is split up, and that one-half of the legal estate is held for that trust and the other half for another trust? The trustees hold the entire legal estate for their particular trust and no other. Then, as to the notice which Nixon is said to have had through Tasker as his solicitor, why should it be assumed that Nixon was aware of a fact the concealment of which was essential to enable Tasker to commit his fraud? *Dixon* v. *Winch* (2) went entirely upon special circumstances. So, in *Boursot* v. *Savage* (3), the ground of the decision was that, upon the particular facts, the trustee was affected with constructive notice through his solicitor. The doctrine of constructive notice will not be extended: it will only be applied

(1) [1899] 2 Ch. 355. (2) [1900] 1 Ch. 736.
(3) L. R. 2 Eq. 134.

where the presumption of knowledge is so strong that it cannot be rebutted—where the party not only might, but ought to, have acquired the knowledge: *Hewitt* v. *Loosemore* (1); *Ware* v. *Lord Egmont*. (2) Now, how can it be said that Nixon made Tasker, in any sense, his alter ego? The evidence shews that he never was himself a client of Tasker's; that he never himself paid Tasker for work done as a solicitor, but that he, Tasker, looked to the trust for payment, and was paid by the trust alone. There was no negligence on Nixon's part in leaving the trust matters to Tasker. Supposing he had in fact employed a separate solicitor to act for himself, he would not have discovered anything, for the only evidence shewing the appropriation in favour of the Brockman trust consisted of the entries in Tasker's private books, to which neither Nixon nor his separate solicitor, if any, could have had any right of access.

Then, with regard to s. 3 of the Conveyancing Act, 1882, the knowledge to be imputed to the client must be knowledge coming to his solicitor in the "same transaction" and moreover knowledge coming to his solicitor "as such"—that is, to his solicitor acting honestly as a solicitor. Now, no knowledge came to Tasker either "in the same transaction," or as Nixon's solicitor, for he was not Nixon's solicitor at all. I submit that Nixon has done everything he ought to have done, and, therefore, is entitled to rely on his legal estate.

RIGBY L.J. We will not give judgment until we have heard the other appeal.

The appeal by the bank, the plaintiffs, in *London and County Banking Co.* v. *Nixon* was heard on February 18, 1901.

*Warmington, K.C., Bramwell Davis, K.C.*, and *Edward Chitty*, for the plaintiffs. (1.) By virtue of the deed of April 5, 1898, the bank acquired the legal estate in a moiety of the property. If a joint tenant of land executes a deed by which he purports to convey the entirety, the deed operates to sever the joint tenancy, and the grantee takes a moiety of the property.

(1) 9 Hare, 449, 454–5. (2) (1854) 4 D. M. & G. 460, 473.

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The operation of the deed is not affected by the fact that the grantor is a trustee of the property: *Boursot* v. *Savage*. (1)

(2.) The mortgage of April 5, 1898, related back to the date of the security of August 14, 1897, and must be treated as if it had been executed on August 14, 1897. Tasker then produced to the bank deeds which shewed that he was the legal owner of the property, and by the equitable security he declared that he would hold his interest on trust for the bank.

[RIGBY L.J. If a trustee in breach of his trust declares that he will hold the trust estate on trust for some one other than his real cestui que trust, has his declaration any operation?]

(3.) By the deed of August 14, 1897, Tasker irrevocably appointed the persons named in it his attorneys to execute any further mortgage of the property. This enabled the bank, without any further act of Tasker's, to acquire the legal estate, and they did acquire it by the deed of April 5, 1898, and, as at the time when they advanced the money to Tasker they had no notice of the trust, they are entitled to hold the legal estate thus acquired against the defendant trustees. The fact that the bank had notice of the trust before the date of the mortgage of April 5, 1898, is immaterial: *Cooke* v. *Wilton* (2); *London and County Banking Co.* v. *Goddard*. (3) *Harpham* v. *Shacklock* (4) is distinguishable, for there the bankers did not, as here, acquire the legal estate in pursuance of the provisions of their equitable security. Sect. 12 (5) of the Trustee Act, 1893 (56 & 57 Vict. c. 53), applies to the present case.

[RIGBY L.J. Can an attorney do that which it would have been a breach of trust for his principal to do?]

There is nothing inequitable in the bank's relying on the

(1) L. R. 2 Eq. 134.
(2) (1860) 29 Beav. 100.
(3) [1897] 1 Ch. 642.
(4) (1881) 19 Ch. D. 207.
(5) By s. 12, "(1.) Where a deed by which a new trustee is appointed to perform any trust contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest, or right."

legal estate under the circumstances. When they advanced the money they had no notice that Tasker was not the absolute owner of the property. The bank did not get in the legal estate as a tabula in naufragio; they had a right by the prior bargain to acquire it when they did so. The form of the original security makes all the difference.

[RIGBY L.J. Was not that provision in the original security a fraud if it enabled a breach of trust to be committed after notice of the trust?]

The only fraud was that which was committed by Tasker upon the bank. The bank are purchasers for value of the legal estate in a moiety of the property without notice of the trust. As regards notice, the material date is that at which the advance was made: *Pilcher* v. *Rawlins*. (1)

[STIRLING L.J. referred to *Saunders* v. *Dehew* (2), where the Court said that a purchaser "shall not protect himself by the taking a conveyance from a trustee after he had notice of the trust, for by taking a conveyance with notice of the trust, he himself becomes the trustee, and must not, to get a plank to save himself, be guilty of a breach of trust."]

*Badcock*, *K.C.*, and *E. Ford*, for the defendants, the Tasker trustees. Apart from any question of notice, Tasker could not convey more than he had himself. He had no equitable estate in the property. The mere machinery employed can make no difference. After notice of the trust the bank made use of the power of attorney—not for the purpose for which it was intended, namely, to convert an equitable estate into a legal estate, but for the purpose of stealing that which they then knew to be trust property.

[RIGBY L.J. The object of the power of attorney was to escape from the doctrine that you cannot effectually acquire the legal estate after notice of a prior title.]

If you get in the legal estate after notice of a fraud, you are a party to the fraud: *Sharples* v. *Adams* (3); *Willoughby* v. *Willoughby* (4); *Taylor* v. *Russell* (5); *Allen* v. *Knight*. (6)

(1) L. R. 7 Ch. 259.
(2) (1692) 2 Vern. 271.
(3) (1863) 32 Beav. 213.
(4) (1756) 1 T. R. 763.
(5) [1891] 1 Ch. 8.
(6) (1846) 5 Hare, 272.

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When the bank acquired the legal estate they had notice of the trust to which it was subject. The form of their original security can make no difference. If Tasker had resisted the performance of his agreement with the bank, and had disclosed his fraud, the Court would not have ordered him specifically to perform it. It was in effect an agreement to give the bank that which belonged to other persons. In the first instance the bank desired not to have the legal estate, because the property was leasehold and they did not wish to be bound by the covenants in the lease. It is said that the legal estate related back to the date of the first security. But the bank either got the legal estate when they advanced the money or they did not. If they did not get it then, they got it after notice of the trust. In *Cooke* v. *Wilton* (1) the plaintiffs had got in the legal estate without notice of the prior registered judgments. In *London and County Banking Co.* v. *Goddard* (2) the present question did not arise. *Saunders* v. *Dehew* (3) and *Willoughby* v. *Willoughby* (4) are distinct authorities adverse to the plaintiffs.

The defendants are entitled to have the deeds delivered up to them: *In re Cooper*. (5) It is immaterial whether the mortgage is declared to be void as against the defendants, or the bank are declared to be trustees of the property for the defendants. Since the Judicature Act the Court will give relief without leaving the parties to enforce their legal remedy: *Manners* v. *Mew*. (6) The defendants are entitled to a reconveyance by the bank of whatever interest they may have.

*Bramwell Davis, K.C.*, in reply. The question is really whether the bank have acquired the legal estate honestly. The form of the bank's security differs materially from that of the security which was given in *Taylor* v. *Russell* (7), and in other cases which have been cited for the defendants.

There is no evidence of fraud in the inception of the transaction.

(1) 29 Beav. 100.
(2) [1897] 1 Ch. 642.
(3) 2 Vern. 271.
(4) 1 T. R. 763.
(5) (1882) 20 Ch. D. 611.
(6) (1885) 29 Ch. D. 725.
(7) [1891] 1 Ch. 8.

Even if the bank fail in this appeal, they ought to be subrogated to the rights of Taylor in the other action.

*Cur. adv. vult.*

April 1. RIGBY L.J. I do not propose to deliver a judgment upon the majority of the points that arose on these appeals, because, as regards those, I am content to rely upon the judgment about to be given by Stirling L.J.; but I wish to state my view upon the position of the Brockman beneficiaries. They claim to be entitled to an appropriation of 700*l.* out of the 1400*l.* lent by Tasker, the solicitor whose frauds have given rise to this question, to Ward upon property on four mortgages of 350*l.* each. Now the facts which appear to me to be relevant on the point upon which I propose to deliver judgment are these: [His Lordship then referred to the payment off to Tasker and C. W. Chubb, the trustees of the Brockman settlement, of the 1000*l.* mortgage debt due to them, and continued:—] From the evidence before us, it appears that Mr. C. W. Chubb—who is not a party to this suit in any way, and appears entirely free from any moral blame, whatever legal liability he may have brought himself under—allowed that 1000*l.* to remain in the hands of Tasker, and, so far as appears from any evidence, he allowed that state of things to go on for years. Tasker, out of that 1000*l.*, applied at least 700*l.* to his own use. That was a fraudulent breach of trust for which, so far as the evidence goes in this case, it would appear—I do not say more, for Mr. Chubb's side of the case has not been presented to us—that Mr. Chubb was liable. That breach of trust could only be made good by a transfer into the names of both trustees of the money or approved or authorized securities for the money. There is no suggestion that the money was ever so transferred, and I shall consider whether there was any appropriation of approved or authorized securities. What is proved amounts to this—that Tasker, without informing the beneficiaries or Mr. C. W. Chubb, makes entries in his own books purporting to shew that he has appropriated a portion of the four mortgage debts in satisfaction of the misappropriated 700*l.* To conceal his fraud, namely, the misappropriation of the 700*l.*, and of other

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moneys probably, he continued to pay the beneficiaries, or others on their behalf, interest on the 1000*l.* as though that sum were duly invested. Now, pausing there, it may be said that, supposing there were nothing more in the case, the position would be as follows: The beneficiaries, on obtaining notice of the entries in the books purporting to make an appropriation, would have been competent, if not under a disability—as indeed they were not—to elect to accept the appropriation, and thereby condone the breach of trust. Or they might have preferred to repudiate the appropriation and have elected to pursue their remedies against Mr. C. W. Chubb with a view to compelling him to make good the deficiency caused by the breach of trust. In that case Mr. C. W. Chubb, if nothing else had happened, would have been entitled, for his own indemnity, to come upon the appropriation made by Tasker. But it is, to my mind, quite clear that Tasker had no power at all to appropriate, as he purported to do by these entries in his books, the security for the 700*l.* in such a way as to bind either the beneficiaries or Mr. C. W. Chubb. It is not an approved security, nor even a competent or an authorized security. It is an altogether irregular and illegal appropriation which the beneficiaries may not care for at all.

Let us test it in this way—and any way we test it, the same result will follow. Suppose the title to the mortgaged property had failed entirely, Tasker could not say to his co-trustee and to the beneficiaries, "I appropriated that fund to you and you must bear the loss." It would be ridiculous to suggest it. Nothing done by him would have bound the beneficiaries or his co-trustee to abide by the appropriation; but of course, if it had, for all purposes, been an appropriation, then, if the property had been lost, the beneficiaries would have had to bear the loss.

Then, in 1895, Tasker having become sole trustee of another settlement, which has been called the "Tasker settlement," it was proposed to appoint a new trustee of that settlement. Thereupon Mr. Nixon, who was the proposed new trustee, sought to ascertain in what securities the funds subject to that Tasker settlement were invested; and he did his duty, so far

as I can see, fully in the matter. He questioned the actual trustee, who told him that the 1400*l.* was invested on mortgage in his own name (he being a sole trustee, it was quite right that they should be), and subsequently, when pressed, produced the four mortgages for 350*l.* each. So far, all appeared to be perfectly regular. Mr. Nixon then said, very properly, that these mortgages would have to be transferred into the joint names of himself and Tasker. Tasker could not, of course, object to that; and accordingly, on the appointment of Mr. Nixon as trustee with Tasker, the transfer, as has now been proved, was made. What is the effect of that transaction? It was a legal mortgage of the securities, which were in Tasker's name already as trustee, to his co-trustee, Mr. Nixon, and himself, at a time when, according to the evidence, the Brockmans were entirely ignorant of the proposed appropriation. It appears to me pretty clear that, that having taken place, the opportunity which might otherwise have arisen for the beneficiaries or the trustees of the Brockman settlement to make an election to avail themselves of that appropriation had gone. They could no longer elect to take what was in no sense theirs and in every sense the property of the Tasker trustees; and I am unable to say that there was any appropriation whatever upon which they can rely.

I do not propose to deal with the other questions, being content to rest upon the judgment of Stirling L.J., which I have read and in which I concur in all other respects.

[His Lordship added an expression of his disapproval of the course taken by the bank in having endeavoured, after, and apparently in consequence of, the notice to them of the title of the Tasker trustees, to secure to themselves the legal estate in the four mortgages in order to give themselves priority.]

VAUGHAN WILLIAMS L.J. I have also read the judgment of Stirling L.J., and propose to say nothing more than that I quite concur in it.

STIRLING L.J. These three appeals raise questions of priority between three sets of claimants (namely, the trustees of two

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marriage settlements and the London and County Bank) to four mortgages, for sums amounting to 1400*l.*, which were originally made in favour of Frederick Talbot Tasker, a solicitor, who has absconded after dealing with the mortgages in such a way as to give rise to the present contest. The facts as now established differ in one important respect from those on which the case was dealt with in the Court below, and are as follows: [His Lordship then stated the facts relating to the Brockman settlement and the alleged appropriation of securities by Tasker to that trust, and continued:—]

At this point arises a question of fact. Was an appropriation actually made by Tasker, or did it rest only in intention? Speaking for myself, I am unable to differ from the conclusion of Farwell J. I place no reliance either on the pencil memorandum, or on the earlier entries to which I have referred, but I think the entries in 1893 and 1894 shew that an actual appropriation was made and that the case is brought within the decisions in *Middleton* v. *Pollock* (1) and *New, Prance & Garrard's Trustee* v. *Hunting* (2), affirmed in the House of Lords under the name of *Sharp* v. *Jackson* (3), which establish that such a transaction may be good though not communicated by a trustee to his beneficiaries. [His Lordship then stated the other facts as above set forth, and continued:—]

Although a mortgage debt is a chose in action, yet, where the subject of the security is land, the mortgagee is treated as having "an interest in land," and priorities are governed by the rules applicable to interests in land, and not by the rules which apply to interests in personalty. The reason is thus stated by Sir William Grant in *Jones* v. *Gibbons* (4): "A mortgage consists partly of the estate in the land, partly of the debt. So far as it conveys the estate, the assignment"—that is, of the mortgage—"is absolute and complete the moment it is made according to the forms of law. Undoubtedly it is not necessary to give notice to the mortgagor, that the mortgage has been assigned, in order to make it valid and effectual. The estate being absolute at law, the debtor has no means of

(1) 2 Ch. D. 104.
(2) [1897] 2 Q. B. 19.
(3) [1899] A. C. 419.
(4) 9 Ves. 407, 410; 7 R. R. 247, 250.

redeeming it but by paying the money. Therefore he, who has the estate, has in effect the debt; as the estate can never be taken from him except by payment of the debt." See also *Wilmot* v. *Pike*. (1)

Leaseholds are real estate for the purposes of this rule: *Wiltshire* v. *Rabbits* (2); *Union Bank of London* v. *Kent*. (3)

In dealing, therefore, with these appeals, the first point to be determined appears to be the state of the legal title. It must now be taken that previously to August 14, 1897, this was vested in Tasker and Nixon as joint tenants. On that day Tasker executed the instrument already stated, and it becomes necessary to ascertain the legal effect of it. As has been pointed out, it is in a form adapted for use in a particular class of cases. It is intended to be employed with the view of creating a security on property in which the estate and interest of the person giving the security may differ widely in different cases. This circumstance accounts for and explains the generality of the language found in the operative part of it. In construing that language in any particular case great weight, as it seems to me, must be attributed to the title disclosed by the scheduled deeds, which form the basis of the whole instrument. In the present case those deeds shewed a good legal title in Tasker, and, in my judgment, Tasker intended to declare himself a trustee of that legal interest, and to authorize the officers of the bank, as his attorneys, to execute a proper mortgage of it to the bank.

The case of *Faussett* v. *Carpenter* (4) might appear at first sight to be an authority for a different conclusion; but, regard being had to the criticisms to which that case was subjected by Lord St. Leonards in *Drew* v. *Earl of Norbury* (5), and by Lord Hatherley in *Carter* v. *Carter* (6), it must be taken to have been decided on its own peculiar circumstances, which differ widely from those now under consideration. In *Drew* v. *Earl of Norbury* (7) Lord St. Leonards states the general rule

(1) (1845) 5 Hare, 14.
(2) 14 Sim. 76.
(3) 39 Ch. D. 238.
(4) (1831) 2 Dow. & Cl. 232; 5 Bli. (N.S.) 75; 35 R. R. 17.
(5) (1846) 3 J. & Lat. 267, 284.
(6) (1857) 3 K. & J. 617.
(7) 3 J. & Lat. 267.

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applicable in such cases to be as follows (1): "When a person having several estates and interests in a denomination of land, joins in conveying all his estate and interest in the lands to a purchaser, every estate or interest vested in him will pass by that conveyance, although not vested in him in the character in which he became a party to the conveyance." A fortiori, in the present case, ought the instrument under consideration to be held to deal with that estate and interest to which Tasker appeared to be entitled on the face of the deeds enumerated in the schedule.

In my judgment the deed of April 5, 1898, operated in execution of the authority conferred on the officers of the bank by the deed of August 14, 1897, and is effectual to the same extent as if it had been executed by Tasker himself, and consequently the joint tenancy subsisting between Tasker and Nixon was thereby severed, and an undivided moiety of each of the legal terms created by the four mortgages became vested in the bank, the other moiety remaining vested in Nixon.

It is next to be considered to what extent the bank and Nixon can avail themselves of the legal titles which have thus become vested in them.

A legal mortgagee who makes an advance without notice of a prior equitable title is a purchaser for value without notice. From such a purchaser a Court of Equity takes away nothing which he has honestly acquired. *Pilcher* v. *Rawlins* (2), *Heath* v. *Crealock*. (3) Further, an equitable mortgagee, who has made an advance without notice of a prior equitable title, may gain priority by getting in the legal title, unless there are circumstances which make it inequitable for him so to do. One case which falls within this exception is where the mortgagee has notice that the legal title, at the time when it is so got in, is held on an express trust in favour of persons who assert a claim to the property: *Saunders* v. *Dehew* (4), *Allen* v. *Knight* (5); *Sharples* v. *Adams* (6); *Taylor* v. *Russell*. (7)

(1) 3 J. & Lat. 284.
(2) L. R. 7 Ch. 259.
(3) (1874) L. R. 10 Ch. 22, 33.
(4) 2 Vern. 271.
(5) 5 Hare, 272; affirmed (1847) 11 Jur. 527.
(6) 32 Beav. 213.
(7) [1892] A. C. 244, 259.

Now, in the present case the legal title was not got in by the bank by the instrument of August 14, 1897. No doubt Tasker thereby declared himself a trustee of the mortgages for the bank, but the legal title such as it then existed remained undisturbed, and Tasker had previously made himself (along with Nixon) an express trustee of the mortgages for the beneficiaries under the Tasker settlement to the full extent of 1400*l.*, and of this and Nixon's claim the bank had notice before April 5, 1898. In my judgment it was inequitable in the bank to get in the legal title against Nixon or the Tasker beneficiaries, and against neither ought the bank to be allowed to gain priority by virtue of it. It was, indeed, contended that the deed of April 5, 1898, related back to August 14, 1897, and *Cooke* v. *Wilton* (1) and *London and County Banking Co.* v. *Goddard* (2) were relied on. But in neither of those cases had the equitable mortgagee notice of any express trust affecting the legal title at the time when it was got in. Further, these cases do not support the proposition for which they were cited, and in the absence of authority the contention appears to be wholly without foundation.

As regards Nixon, the cases of *Thorndike* v. *Hunt* (3) and *Taylor* v. *Blakelock* (4), both decided in Courts of Appeal, establish that he must be treated as a purchaser for value, on the ground that by accepting the transfers he gave up a right of action which he had against Tasker for the 1400*l.* It is not alleged that Nixon had himself any actual knowledge or notice of the appropriation made in 1889 by Tasker in favour of the beneficiaries under the Brockman settlement; but it is contended that he had constructive notice thereof either personally or through Tasker, who, it is said, acted as solicitor in the preparation of the transfers. In this respect the case is governed by the Conveyancing Act, 1882. By the definition contained in s. 1, sub-s. 4 (ii.), of that Act, "purchaser" includes a "mortgagee or an intending purchaser . . . . or mortgagee, or other person who, for valuable consideration, takes or deals for property." Sect. 3 provides (sub-s. 1) that "a purchaser

(1) 29 Beav. 100.
(2) [1897] 1 Ch. 642.
(3) 3 De G. & J. 563.
(4) 32 Ch. D. 560.

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shall not be prejudicially affected by notice of any instrument, fact, or thing unless—(i.) It is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or (ii.) In the same transaction in respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent." This section has been to some extent judicially construed in *Bailey* v. *Barnes*. (1) In delivering the judgment of the Court of Appeal, Lindley L.J. says (2): "'Ought' here does not import a duty or obligation; for a purchaser need make no inquiry. The expression 'ought reasonably' must mean ought as a matter of prudence, having regard to what is usually done by men of business under similar circumstances."

Now, applying this to the present case, as regards sub-clause (i.), by means of what possible inquiries or inspections on the part of Nixon would the prior appropriation have come to his knowledge? All that could be suggested by counsel in argument was an inquiry whether the mortgages were subject to any incumbrances. It is now settled that a vendor is not bound to answer such a general inquiry: *In re Ford and Hill* (3), and in my opinion Nixon might reasonably abstain from making it. As regards sub-clause (ii.), though the appropriation was perfectly well known to Tasker, still it did not come to his knowledge as Nixon's solicitor, nor in the same transaction in respect to which the question of notice arises.

Again, if Nixon had employed an independent solicitor or other agent, what inquiries or inspections ought reasonably to have been made which would have brought the appropriation to his knowledge? It is said that an independent solicitor ought to have called for an abstract of Tasker's title, and that

(1) [1894] 1 Ch. 25. (2) [1894] 1 Ch. 35.
(3) 10 Ch. D. 365.

such an abstract would have disclosed the appropriation. But the leases and mortgages were produced by Tasker, and I fail to see why, in the case of a title so simple, an abstract ought to have been called for. An independent solicitor might, without negligence, have dispensed with an abstract. Even if an abstract had been called for, I cannot believe that it would have disclosed the appropriation. The transfers actually prepared by Tasker do not disclose it.

In support of the contention that Nixon had notice of the prior appropriation, two cases were cited: *Freeman* v. *Laing* (1), decided by Byrne J., and *Boursot* v. *Savage* (2), decided in 1866 by Kindersley V.-C. As to the former, it seems sufficient to say that it was decided on the law relating to tacking; and the learned judge expressly states that no question arose as to the effect of a purchase for value without notice, and it may for the present purpose be left out of consideration. As to the latter, I do not doubt that it was correctly decided according to the law as it stood in 1866, but the Conveyancing Act, 1882, has introduced very considerable modifications, to which the Court is now bound to give effect.

In my opinion Nixon became a purchaser for value and without notice of a legal interest in one moiety of these mortgage debts and the legal terms by which they were secured. It was not contended that he has been guilty of any act or omission which, as against the plaintiffs or the bank, would deprive him of priority against either of them; nor, regard being had to the rules laid down by this Court in *Northern Counties of England Fire Insurance Co.* v. *Whipp* (3), could such a contention succeed.

The result, therefore, is that as regards the undivided moiety legally vested in Nixon, he, and his cestuis que trust, the beneficiaries under the Tasker settlement, are entitled to priority over both the bank and the beneficiaries under the Brockman settlement; while, as regards the undivided moiety legally vested in the bank, the latter gains no priority as against Nixon and his cestuis que trust.

(1) [1899] 2 Ch. 355. (2) L. R. 2 Eq. 134.
(3) 26 Ch. D. 482.

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I next proceed to consider the order of priority between the purely equitable titles. This is governed by order of time—unless there has been some act or omission on the part of the owner of an equitable title prior in point of time, such as to cause that title to be postponed to a subsequent equitable interest.

The rules which govern the postponement of a prior legal estate to a subsequent equitable estate were, in the year 1884, laid down by Fry L.J. in delivering the judgment of the Court of Appeal in *Northern Counties of England Fire Insurance Co.* v. *Whipp* (1), already referred to. In 1890 Kay J. in *Taylor* v. *Russell* (2) carefully considered the law with respect to the postponement of a prior to a subsequent equitable interest, and came to the conclusion that the same rules as those laid down in *Northern Counties of England Fire Insurance Co.* v. *Whipp* (1) applied to the case before him. On appeal, his Lordship's decision was reversed on another ground, and the Court of Appeal declined to consider any question as to the relative equities which arose under the circumstances of the case. (3) In the House of Lords (4) the decision of the Court of Appeal was affirmed on the same ground: but Lord Macnaghten, in advising the House, took occasion to remark that he was not satisfied of the correctness of the view taken by Kay J. I am not aware that the precise point considered by that learned judge has since arisen for decision; and if it were necessary to decide it in the present case, I should think it my duty to examine with the utmost care his judgment in *Taylor* v. *Russell* (2) and the authorities relied on by him. I think, however, that on the present occasion such an examination may be dispensed with.

The ground of postponement relied on in this case is that the prior equitable claimants allowed Tasker to remain in possession of the title-deeds, including the mortgages to himself. There are undoubtedly cases (as, for example, *Waldron* v. *Sloper* (5) and *Farrand* v. *Yorkshire Banking Co.* (6) ), where

(1) 26 Ch. D. 482.
(2) [1891] 1 Ch. 8.
(3) Ibid. 30.
(4) [1892] A. C. 244.
(5) (1852) 1 Drew. 193.
(6) 40 Ch. D. 182.

an equitable mortgagee who has allowed his mortgagor to retain or regain possession of the title-deeds has been postponed to a subsequent equitable incumbrancer who has obtained possession of the deeds. But where the relation between the equitable incumbrancer and the person in possession of the title-deeds is not merely that of mortgagee and mortgagor, but is of a fiduciary nature (as, for example, that of cestui que trust and trustee, or client and solicitor), there is a great body of authority to shew that the equitable incumbrancer is not to be deprived of his priority by reason of the improper acts of the person entrusted with the deeds, so long, at all events, as the incumbrancer has no ground to suppose that there has been any want of good faith on the part of the custodian of the deeds.

The leading authorities on this point appear to be *Cory* v. *Eyre* (1), *Shropshire Union Railways and Canal Co.* v. *Reg.* (2), and *In re Vernon, Ewens & Co.* (3), before the Court of Appeal. This last case, in some of its features, bears a resemblance to the present. A client left in the hands of his solicitors 11,000*l.* for investment. The solicitors represented that this sum was invested on mortgage of certain specified property, and the client made no further inquiry. The solicitors were in fact the holders of a mortgage for 55,000*l.* on the specified property, and afterwards dealt with the mortgage by giving it up in exchange for other property in which they acquired an equity of redemption, and this equitable interest they subsequently sold. It was held that the solicitors must be treated as having become trustees for their client of 11,000*l.* out of the 55,000*l.* secured by the mortgage, and as having, as against the client, dealt improperly with this mortgage; and consequently that the latter was entitled to a charge on the substituted property. It was further held that the client was entitled to enforce this charge against the purchasers. Cotton L.J. made these remarks (4): "Then there was a case of *Waldron* v. *Sloper* (5); and that is the case which may be said to be most like the present; but what was it? Waldron

(1) (1863) 1 D. J. & S. 149.
(2) (1875) L. R. 7 H. L. 496.
(3) (1886) 33 Ch. D. 402.
(4) Ibid. 409.
(5) 1 Drew. 193.

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had an equitable security which was the first incumbrance on the property, and he put the deeds, not into the hands of a person who owed any duty to him, but into the hands of his mortgagor, and then that mortgagor kept them, without any inquiry from Waldron, and dealt with the property on the footing that he was entitled to the deeds. In my opinion that is an entirely different case from one in which a person lets his solicitor have his deeds in his hands, or trusts to his solicitor when the solicitor has undertaken a duty for him, and has, as in this case, made himself a trustee of that which he ought to have acquired in the name of his client, but has in fact acquired in his own name." Then Cotton L.J. said (1): "It is not a sufficient ground for postponing the client, for whom the solicitor had become a trustee, but was not openly a trustee, simply because the client had not made inquiry as to how the solicitor had performed his duty."

The same principle was applied by Chitty J. in *Carritt* v. *Real and Personal Advance Co.* (2), a strong case. I think that it must also be applied here.

So far as the title of Nixon or the beneficiaries under the Tasker settlement is equitable only, he and they were entitled to rely on Tasker for the performance of his duty as one of the trustees of that settlement. In my judgment, the bank is not entitled to say that the Tasker trustees have lost priority in respect of their equitable title. The same principle applies as between the Tasker trustees and the Brockman trustees, so far as the title of the Tasker trustees is equitable only.

It was contended on behalf of the Brockman trustees that, as between them and the Tasker trustees, they are prior in point of time, and that even although they may not be entitled to priority as between themselves and the bank, they ought, to the extent of the charge, to be allowed to stand in the place of the Tasker trustees, in accordance with the rule applied to the priority of judgment creditors in *Benham* v. *Keane* (3), and treated by Fry L.J. in *In re Wyatt* (4) as applicable between incumbrancers.

Now, a purchaser for value without notice is entitled to the

(1) 33 Ch. D. 410.
(2) 42 Ch. D. 263.
(3) 3 D. F. & J. 318.
(4) [1892] 1 Ch. 188, 208-9.

benefit of a legal title, not merely where he has actually got it in, but where he has a better title or right to call for it. This rule is laid down in *Wilkes* v. *Bodington*. (1) It has accordingly been held that if a purchaser for value takes an equitable title only, or omits to get in an outstanding legal estate, and a subsequent purchaser for value without notice procures, at the time of his purchase, the person in whom the legal title is vested to declare himself a trustee for him, or even to join as party in a conveyance of the equitable interest (although he may not formally convey or declare a trust of the legal estate), still the subsequent purchaser gains priority: see *Wilkes* v. *Bodington* (1), *Maundrell* v. *Maundrell* (2), *Stanhope* v. *Earl Verney* (3), *Wilmot* v. *Pike* (4), and *Rooper* v. *Harrison*. (5)

Here Nixon, on being appointed a trustee of the Tasker settlement, insisted that the mortgages for 1400*l*. should be legally transferred to himself and Tasker as trustees of that settlement. Tasker was not merely a formal, but an actual conveying party to the instruments by which this was done. By accepting the transfers Nixon gave up a right of action which he had against Tasker, and became a purchaser for value without notice of any prior incumbrance. There was no suspicion attaching to Tasker at this time, and it would have been a breach of trust to vest the legal title to these securities in any persons other than Tasker and Nixon, the duly constituted trustees of the Tasker settlement. Everything, therefore, was done that could be done to deal with the legal title in such a way that the securities should be vested in the proper persons with the object that they should be effectually held on behalf of the Tasker beneficiaries.

The position of the Brockman trustees and beneficiaries is very different. They got from Tasker no declaration of trust, nor any assignment of the legal title. None of them gave up any right whatever against Tasker, or gave other valuable consideration for what Tasker did. The securities were never legally vested in the Brockman trustees as such; and the

(1) (1707) 2 Vern. 599.
(2) (1805) 10 Ves. 246, 270; 7 R. R. 393.
(3) (1761) 2 Eden. 81.
(4) 5 Hare, 14, 22.
(5) 2 K. & J. 86, 106.

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appropriation made was the voluntary act of Tasker, and of Tasker alone.

In my judgment, the Tasker trustees have acquired a better right than the Brockman trustees to call for the legal title which, prior to April 5, 1898, was vested in Tasker.

The result is that the Tasker trustees are entitled to the mortgages of the Park Terrace property in priority to the other claimants.

In the action of *London and County Banking Co.* v. *Nixon* a question arises between the bank and the trustees of the Tasker settlement with reference to a mortgage for 800*l.* on two houses in Stanley Gardens. The contest is precisely similar to that between the same parties as to their priority with regard to the mortgages on the Park Terrace property, and must have a similar result—that is to say, the Tasker trustees have priority over the bank.

It remains to dispose of the costs of these appeals. The first is that of the Tasker trustees, and it succeeds. The result, therefore, is that they will be entitled to their costs of this appeal. As regards the appeal of the Brockman trustees, and any costs occasioned by their cross-notice in the Nixon appeal, the opinion of the Court is that the appeal fails, and that they must pay the costs. As regards the remaining appeal, that of the London and County Bank in the second action, the appeal of the bank fails and must be dismissed with costs.

RIGBY L.J. As regards the legal estate which is at present vested in the bank, as we have decided that they ought not to have had it, they ought not to keep it. There must therefore be a direction that they reconvey it to the trustees of the Tasker settlement; and also deliver up the deeds to those trustees. Mr. Greswell, who has been appointed a trustee of the Tasker settlement since the commencement of the action by the trustees of that settlement, should be added as a party to that action and to the appeal.

Solicitors: *Freeman & Son; White, Borrett & Co., for Brockmans, Folkestone; Harries, Wilkinson & Raikes.*

G. I. F. C.
W. L. C.

## BELLERBY *v.* ROWLAND & MARWOOD'S STEAMSHIP COMPANY, LIMITED.

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*May* 1, 2, 15.

[1900 B. 4759.]

*Company—Surrender of Shares—Ultra vires—Transaction amounting to Sale and Purchase—Release of Liability on Shares—Rectification of Register—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 35—"*Justice of the Case*"—*Lapse of Time—Restoration of Shares surrendered.*

A surrender to a limited company by shareholders of partly paid shares in the company is a transaction of purchase and sale, the company in effect purchasing the shares at the price of discharging the shareholders from their liability to calls, and such a transaction is bad under the decision in *Trevor* v. *Whitworth*, (1887) 12 App. Cas. 409.

The directors of the defendant company, in 1893, with the object of making good to the company a loss which had been incurred, surrendered to the company eighty-three shares each, the shares being 11*l.* shares with 10*l.* only paid thereon. The articles of the company empowered the directors to accept from any member the surrender of his shares or any part thereof, upon such terms as should be agreed, and resolutions of the board were passed accepting the surrenders and cancelling the certificates for the shares. The company afterwards became prosperous, and in 1900 it was suggested, at a meeting of shareholders, that the shares should be restored to the directors. An action was brought to have the surrenders declared inoperative, and the register of members rectified by inserting the names of the directors or their representatives in respect of the surrendered shares:—

*Held*, that the surrenders were bad, as being a purchase by the company of its own shares; but that the justice of the case did not require the rectification of the register after the lapse of more than seven years, and when nothing had happened in the meantime except that the company, which in 1893 had been embarrassed, had now become prosperous.

*Sichell's Case*, (1867) L. R. 3 Ch. 119, and *In re Dronfield Silkstone Coal Co.*, (1880) 17 Ch. D. 76, upon the question of rectification, applied.

ACTION for the purpose of determining whether or no a purported surrender of certain shares in the defendant company was valid.

The company was incorporated in May, 1890, with a capital of 275,000*l.*, divided into 25,000 shares of 11*l.* each. The objects of the company were, shortly, to acquire steamships and vessels of every description, and to carry on the business of shipowners.

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Art. 37 of the company's articles of association was as follows: "The directors may accept from any member, on such terms and conditions as shall be agreed, the surrender of his shares, or stock, or any part thereof."

In 1893 the plaintiffs, Bellerby, Moss, and Marwood, were, with William Wright and John Rowland (since deceased), the directors of the company. Bellerby, Moss, and Marwood were still three of the directors. In 1893 a new steamship, the *Golden Cross*, was built for the company by contractors, and, owing to the depressed condition of the shipping trade, it was difficult to provide funds to make the necessary payments to the contractors. An opportunity of selling the ship before her first voyage having occurred, the directors thought it prudent to sell her, and she was sold at a loss of over 4000*l.* in respect of the contract. The directors agreed to bear that loss between them, and, with the object of relieving the company from the loss, arranged that each of the directors should surrender to the company eighty-three of the shares in the company held by him. The shares were then paid up to the extent of 10*l.* per share, 1*l.* per share remaining still payable. By resolutions of the board of June 29 and 30, 1893, the transaction was confirmed, and the certificates for the shares surrendered were cancelled, new certificates being issued to the directors for the balance of their holdings. In July, 1893, the directors executed a deed-poll declaring that they had respectively surrendered the shares identified by the numbers on the register and all their interest therein respectively, "the object of such surrender being to make good to the said company all losses sustained by it in relation to the steamship *Golden Cross*, recently sold by us as such directors as aforesaid to the International Line Steamship Company. But (without prejudice nevertheless to the validity of such surrender) we hereby expressly declare that we do not, nor does any one of us admit, that we or any of us are or is under any obligation whatsoever to make good such losses or any part thereof."

The intention of the directors was that the shares should become vested in the company, and that they should not remain liable for the 1*l.* per share at that time unpaid. Since

1893 the business of the company had become more prosperous, and at general meetings of the shareholders held on September 20, 1899, and September 19, 1900, the view was expressed that the prosperity of the company warranted the restoration of their shares to the former directors and the representatives of the two who had died, and, as the result of a further meeting of shareholders held on October 10, 1900, this action was brought against the company by the three surviving directors, and the executors of the two who had died, claiming (1.) a declaration that the surrender or purported surrender of the shares and the acceptance thereof by the company was ultra vires of the company and inoperative; (2.) to have the deed-poll of July, 1893, set aside and cancelled; (3.) payment of all dividends payable in respect of the shares since June, 1893; and (4.) that the register of members of the company might be rectified by inserting the names of the several plaintiffs as shareholders in respect of the shares surrendered by them or their testators respectively with the sum of 10*l.* paid up on each share. The claim for back dividends was afterwards abandoned.

The action now came on for trial.

*P. O. Lawrence*, *K.C.*, and *Eustace Smith*, for the plaintiffs. The surrenders were invalid. The transaction amounted to a purchase of its own shares by the company, and such a purchase is ultra vires in the case of a company of this kind: *Trevor* v. *Whitworth*. (1) In *Trevor* v. *Whitworth* (1) the House of Lords disapproved of the reasoning of the Court of Appeal in *In re Dronfield Silkstone Coal Co.* (2), so that case can no longer be regarded as an authority that a company can purchase its own shares, even as part of an arrangement for the benefit of the company. The Lords preferred the view of Sir G. Jessel in that case, that it was inconsistent with the nature of a company that it should become a member of itself. There are only two cases in which a surrender of shares is valid—(1.) where the company is in a position to forfeit the shares, and (2.) where the surrender is for the purpose of

(1) 12 App. Cas. 409. (2) 17 Ch. D. 76.

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the shareholders receiving new shares in the company of a different kind, and the rights of creditors are not affected: *Eichbaum* v. *City of Chicago Grain Elevators, Limited* (1), and *Teasdale's Case*. (2) In the present case it is clear that the real object was to reduce the capital of the company for the benefit of the shareholders, and incidentally uncalled capital was cancelled, which affected the creditors. That could only be done under the provisions of the Companies Act, 1867. For these reasons the surrenders should be set aside.

There is no reason why the register should not be rectified by entering the names of the plaintiffs as shareholders. Under s. 35 of the Companies Act, 1862, that can be done if the Court is "satisfied of the justice of the case." In *In re Dronfield Silkstone Coal Co.* (3) the Court of Appeal did not think it just that the shareholder should be restored to the register, and in that respect the House of Lords did not disapprove of the decision; but the circumstances here are different. There has been no winding-up as in that case.

*Warrington, K.C.*, and *H. E. Wright*, for the company. There is no decision that a surrender of shares is invalid except where it takes the form of a purchase, but there are cases where it has been held valid, both where it involves a release of liability and where it does not. It seems to have been recognised both in *Trevor* v. *Whitworth* (4) and *In re Dronfield Silkstone Coal Co.* (3) that a surrender may be valid in some cases. If that is so, and the circumstances can be looked into, the argument that it is a reduction of capital, and so ipso facto invalid, falls to the ground. If it went ever so little beyond the powers of the company it would be ultra vires, and the circumstances could not be looked into. Therefore the mere fact of its being a reduction of capital does not make the surrender invalid. Otherwise, it would be irrelevant to consider the bona fides of the transaction. If a shareholder cannot validly surrender his shares and get a release from liability, the fact that he is going to take a new liability under other shares cannot make the transaction valid—the surrender

(1) [1891] 3 Ch. 459.
(2) (1873) L. R. 9 Ch. 54.
(3) 17 Ch. D. 76.
(4) 12 App. Cas. 409.

is what has to be dealt with. The power to accept a surrender of shares where carried out bonâ fide and with a view to the benefit of the company has been upheld in *Eichbaum* v. *City of Chicago Grain Elevators, Limited* (1), *Teasdale's Case* (2), *Snell's Case* (3), *Campbell's Case* (4), and *In re Denver Hotel Co.* (5), and there is nothing to the contrary in *British and American Trustee and Finance Corporation* v. *Couper.* (6) In *Snell's Case* (3) there was an actual release of liability. Even though the shares are fully paid up the surrender involves a reduction of capital, though temporary only. It reduces the amount in the balance-sheet, and so makes the profits seem larger, and the division of profits is between a smaller number of persons. Surrendered shares, however, can be reissued—they are not in the position of shares permanently cancelled.

As regards the authorities the other way, *Trevor* v. *Whitworth* (7) is not really to the point. The foundation of Lord Herschell's judgment was that what was done there was a return to the shareholders of part of their money (8), and he says (9) that forfeiture and surrender do not involve any payment out of the funds of the company, and that each case of surrender must be decided upon its own merits. Lord Watson (10) puts it that a purchase of shares by a company is a return to the shareholder of a part of the trading capital of the company, while a surrendered share remains with the company and may be reissued, the shareholder being relieved from further liability. Lord Macnaghten (11) seems to take the same view of a purchase of shares. The transaction here was not a purchase of or a dealing by the company with its shares, and it was not a wrongful application of capital within *Trevor* v. *Whitworth* (7), or the reasoning of Sir G. Jessel in *In re Dronfield Silkstone Coal Co.* (12) It involved no application of paid-up money of the company, and it is not invalid. *Snell's Case* (3) and *Teasdale's Case* (2) were referred to in *Trevor* v.

(1) [1891] 3 Ch. 459.
(2) L. R. 9 Ch. 54.
(3) (1869) L. R. 5 Ch. 22.
(4) (1873) L. R. 9 Ch. 1.
(5) [1893] 1 Ch. 495, 505.
(6) [1894] A. C. 399.
(7) 12 App. Cas. 409.
(8) Ibid. 415.
(9) Ibid. 417, 418.
(10) Ibid. 424.
(11) Ibid. 432.
(12) 17 Ch. D. 76.

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*Whitworth* (1), and it was not said that the release of liability in itself was a wrongful application of money of the company. If that had been a test of validity, it would surely have been referred to.

Even if the transaction was bad, it is not a case where the Court ought to interfere by rectifying the register. Sect. 35 of the Companies Act applies whether there is a winding-up or not. The plaintiffs could not now be placed on the list of contributories if the company were being wound up. The surrenders took place too long ago, and the company has benefited by them, and it has not been shewn that any persons who are creditors now were creditors before the surrenders: *In re Dronfield Silkstone Coal Co.* (2) and *Trevor* v. *Whitworth.* (3) The justice of the case does not require rectification. These persons were willing to withdraw in 1893, and now that the company is more prosperous they want to come back again. In all the reports since 1893, the capital has been stated at the smaller amount, and the dealings with the company and with the shares must have been on the footing of the reduced capital.

*Lawrence, K.C.*, in reply. The proposition that every transaction by way of surrender which does not involve payment of the money of the company is valid is too wide. That was dealt with by Jessel M.R. in *In re Dronfield Silkstone Coal Co.* (4) The Court has to consider in each case whether the surrender involves in substance a reduction of capital, and if so it is invalid. *Snell's Case* (5) cannot stand after *Trevor* v. *Whitworth.* (1) *Hall's Case* (6) is a case of the same kind, and *Snell's Case* (5) was distinguished there. In *Eichbaum* v. *City of Chicago Grain Elevators, Limited* (7), and *Teasdale's Case* (8) there was no reduction of capital involved. If the transaction here were valid, the whole of the capital of a company except seven shares could be surrendered. In *In re Denver Hotel Co.* (9) the shares were all fully paid, so it is no guide in this

(1) 12 App. Cas. 409.
(2) 17 Ch. D. 76.
(3) 12 App. Cas. 420, 429, 439.
(4) 17 Ch. D. 85.
(5) L. R. 5 Ch. 22.
(6) (1870) L. R. 5 Ch. 707.
(7) [1891] 3 Ch. 459.
(8) L. R. 9 Ch. 54.
(9) [1893] 1 Ch. 495.

case, even if the case can be looked upon as an authority after the comments upon it in *British and American Trustee and Finance Corporation* v. *Couper*. (1) In the present case uncalled capital is being released, and that is the same as payment of money. The transaction was either a sale or a reduction of capital.

Assuming that the transaction was ultra vires, there would be no injustice to any one in rectifying the register. The shareholders are the only persons who could object, and, though they have had notice of what is proposed, none have objected. It is not fair that the plaintiffs should have to run the risk of an application by the liquidator to put them on the list of contributories if the company is wound up.

The plaintiffs have not been guilty of laches and are not affected by *Sichell's Case*. (2) They took proceedings as soon as they knew that there was any doubt as to the validity of the surrenders.

*Cur. adv. vult.*

May 15. KEKEWICH J. There was submitted in argument the dry question whether a company under the Act of 1862 can accept a surrender of shares. It is a question of deep interest, affording opportunities of subtle argument, and involving consideration of general and statute law, and also of the nature of a share, which, though commonly and conveniently treated as an entity, is really only a right with liability attached. "It is inconsistent," says Lord Watson in *Trevor* v. *Whitworth* (3), "with the essential nature of a company that it should become a member of itself," and the observation connotes many, if not all, the objections to a surrender founded on general law. But a company under the Act of 1862 is the creature of statute, and the limit and extent of its powers must be ascertained from Acts of Parliament. These Acts have been examined again and again with somewhat varying results, and it may be that an answer to the dry question, which has never been clearly decided, cannot be certainly found in any of the authorities. It will not be found in this judgment. There is a strong

(1) [1894] A. C. 399. (2) L. R. 3 Ch. 119.
(3) 12 App. Cas. 424.

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current of opinion in favour of upholding surrenders in connection with forfeiture for due cause, even though the forms of forfeiture have not been complied with, and more than one judge has inclined to, if he has not expressed, the opinion that, to use the language of FitzGibbon L.J. in *Weekes' Case* (1), "Shares might be given by a shareholder gratuitously for the advantage of the company." In a concise summary, which indicates the absence of finality, Mr. Palmer in his Company Law, 3rd ed. p. 67, says: "Possibly a surrender to the company by way of donation may be free from objection." But it must be taken to have been conclusively settled by the House of Lords in *Trevor* v. *Whitworth* (2) that a company under the Act of 1862 has no power to purchase its own shares, and that such a transaction cannot be sanctioned even by the memorandum of association. What took place in 1893, when the directors of the defendant company surrendered eighty-three shares each, was distinctly to my mind a transaction of purchase and sale, and not a gratuitous gift for the advantage of the company, or a donation; and on that ground I hold it to be bad without more. My view is easily explained. The shares of the company were of 11*l.* each, and on each share 10*l.* had been paid, so that there remained 1*l.* per share liable to be called up at any time when the needs of the company required it. By the surrenders the directors were freed from this liability, or, in other words, the company purchased the shares at the price of discharging the directors from such liability. That there was no express bargain of this kind is to my mind immaterial; but it is not beside the mark to observe that at the date of the surrenders the company was not successful, and the possibility of the 1*l.* per share being called up was by no means remote.

Having regard to the comments on other cases in the House of Lords in *Trevor* v. *Whitworth* (2), none of them can be treated as now in force as against the view above expressed; but in *Snell's Case* (3) Giffard L.J. upheld a surrender of shares on which there was a liability for calls; and if that decision can properly be treated as unimpeached, it is undoubtedly in con-

(1) (1886) 17 L. R. Ir. 239, 263. (2) 12 App. Cas. 409.
(3) L. R. 5 Ch. 22.

flict with my opinion, which I should therefore be bound to abandon. *Snell's Case* (1) was cited in *Trevor* v. *Whitworth* (2), and, according to the reporter, commented on at length; but it is not noticed by any of the learned Lords who took part in the judgment of the House. It seems to me, however, that the Lord Justice's decision is not only inconsistent with much that was said, but is directly in conflict with the actual result. In saying this, I am of course assuming the soundness of my view that the surrender of shares not fully paid up is really a transaction of sale and purchase, and *Snell's Case* (1) does not say that it is not.

It does not follow that because the surrenders of shares were bad the plaintiffs are now entitled to succeed in their claim to be restored to the register in respect of them. The power of rectifying the register given by the 35th section of the Act of 1862 is discretionary in this sense—that the Court properly can only exercise it if satisfied of the justice of the case, and on many applications the Court has declined to exercise this power on the ground that it would not be fair to do so, or, to put it more technically, that the applicant has not established any equity to disturb the existing state of things. And, in considering this, the Court has always had regard to the lapse of time, and to any facts and circumstances indicating acquiescence in the existing state of things by those on whose behalf the application is made to disturb it. The applications have been generally made by official liquidators seeking to establish liability for calls; but obviously the like considerations must apply to applications by those who seek to be restored to the privileges of shareholders. Of the authorities on such applications, *Sichell's Case* (3) is a good example; but I will not refer to it in detail further than to add that it is particularly valuable for a considered judgment of Lord Cairns. There is, I think, one even more pointed and cogent authority to be found in Lord Macnaghten's comments on the case of *In re Dronfield Silkstone Coal Co.* (4) in the House of Lords. That case was necessarily discussed at length in *Trevor* v. *Whitworth* (2), and

(1) L. R. 5 Ch. 22.
(2) 12 App. Cas. 409.
(3) L. R. 3 Ch. 119.
(4) 17 Ch. D. 76.

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the grounds of the decision of the Court of Appeal were not regarded with favour. But Lord Macnaghten took occasion to point out that, while disapproving of the grounds, he thought the decision itself was sound. His reasons are given on p. 440 of 12 App. Cas., and, in short, he held that the liquidator had no equity to place Mr. Ward's name on the register when it had been off it for seven years, during which the company had been prosperous, and the shareholders who remained had received dividends largely increased by Ward's retirement. Lord Macnaghten cites Lord Cairns' decision in *Sichell's Case* (1), and fully approves it. Here the surrenders took place in 1893, and more than seven years afterwards the surrenderors ask the Court to restore them to their original position. Nothing has occurred in the meantime except that the company which was embarrassed has turned out to be prosperous, and the plaintiffs, if placed on the register, will become entitled to share the fruits of prosperity which were renounced when apparently not within reach. It is conceivable that some persons purchased shares in the company, and perhaps at a premium, with the knowledge that the capital had been reduced by the surrenders, and with the anticipation that their proportion of profits would be larger than it would have been if those surrenders had not been made; but, apart from this or any like consideration, it lies on the applicants to satisfy the Court that justice requires their application to be granted—that there is an equity in their favour to disturb the existing state of things. I am told that the shareholders as a body desire the application to be granted, and deem it only fair that those who acted generously in the past should be treated generously now; but, dealing with the case judicially, I cannot hold that the plaintiffs have brought themselves within the requirements of the statute by which my conclusions must be guided.

There will be judgment for the defendants. I take it for granted that they do not ask for costs.

Solicitors: *Bell, Brodrick & Gray, for W. S. Gray, Whitby; Radford & Frankland, for Buchannan & Sons, Whitby.*

(1) L. R. 3 Ch. 119.

## ELLIMAN, SONS & CO. *v.* CARRINGTON & SON, LIMITED.

KEKEWICH J.

1901 ~~ May 15.

[1900 E. 478.]

*Contract—Validity—Restraint of Trade—Sale to Wholesale Trader on Contract requiring him to resell on Specified Terms.*

The plaintiffs, who were manufacturers of goods, sold them to wholesale traders under a contract whereby the purchasers bound themselves not to sell the goods for less than certain specified prices, and if they sold to the trade to procure a similar signed agreement from every retailer whom they supplied. The purchasers sold some of the goods to retail traders without procuring from them any such agreement as provided by the contract:—

*Held*, that the contract was not in restraint of trade, and that the vendors could maintain an action in respect of the breach of it.

TRIAL OF ACTION.

The plaintiffs carried on business as manufacturers and purveyors of the preparations or embrocations known as "Elliman's Royal Embrocation" for horses and cattle, and "Elliman's Universal Embrocation" for human use.

The embrocations were sold by the plaintiffs wholesale to druggists and other wholesale and retail dealers, and, in order that the embrocations might not be sold below the usual fixed market price, the plaintiffs required every trade purchaser of the embrocations to sign and procure agreements by sub-purchasers in the trade in the following form:—

"We, the undersigned, pledge ourselves not to sell Elliman's Embrocations under the Prices named above, and to faithfully comply with the conditions therein enumerated.

"Signed

"Address

"Date."

This form of agreement was annexed to and referred to a memorandum in the words and figures following:—

"Minimum price 11*d.* nett, for 1*s.* size Royal.

"Elliman's Embrocations,

"Home Trade.

"September 25th, 1889.

"Messrs. Elliman, Sons & Co., finding the indirect Buyer

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to be the block in the way of the success of their scheme, now require us to procure a signed Agreement not to undersell the prices given below.

"Signing the annexed agreement will bind you not to sell *retail* at less than—

"1/9 for 2/– size nett.
"2/2 „ 2/6 „ „
"3/– „ 3/6 „ „
"1/– „ 1/1½ „ „
"2/4 „ 2/9 „ „

"(Full prices may of course be charged as heretofore where practicable.)

"If you sell any of Elliman's Embrocation to the Trade, it will further bind you to procure a similar signed Agreement from every retailer that you supply. It will be necessary for you to send in this Agreement, signed at the time of, or before sending your next order for Elliman's Embrocations, or we shall be unable to execute it."

The defendants, C. Carrington & Son, Limited, in February, 1900, purchased from the plaintiffs a quantity of bottles of their embrocations, and the form of agreement set out above was signed by Carrington & Son, or on their behalf.

Carrington & Son sold part of their consignment to the defendants, J. & J. Thompson & Co., Limited, without procuring from them a similar agreement to that entered into by Carrington & Son. Thompson & Co. sold the goods so purchased at prices less than those stipulated for by the agreement, and the plaintiffs thereby, as they alleged, suffered damage. Thompson & Co. did not enter into any agreement with the plaintiffs.

There was another defendant, named Luke Crabtree, trading as W. Walker & Co. The facts as to him were substantially similar to those affecting Carrington & Son.

The plaintiffs claimed an injunction to restrain the defendants, their servants and agents, from selling or offering for sale, or authorizing or permitting to be sold or offered for sale, the plaintiffs' said embrocations under the prices fixed by the plaintiffs by their said agreements, or otherwise committing a

breach of the said agreements. They also claimed damages and costs.

At the trial of the action there was no substantial dispute as to the facts, and the sole question argued was whether the contracts entered into were invalid as being in restraint of trade or otherwise.

*Renshaw, K.C.*, and *E. Ford*, for the plaintiffs, submitted that the contract between the plaintiffs and Carrington & Son was valid and enforceable in law.

[They were stopped by the Court.]

*Warrington, K.C.*, and *Austen-Cartmell*, for the defendants. This contract is a most bare-faced restraint of trade, and peculiarly injurious to the public. The object aimed at is to prevent the sale of this article to the public at a fair price regulated in the ordinary way by the laws of supply and demand. Such a contract is "unlawful" in the sense in which that word is expounded by Lord Halsbury L.C. in the case of the *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1), namely, that the law will not give effect to it. In *Hilton* v. *Eckersley* (2), which was recognised as an authority in the case in the House of Lords last mentioned, there was a contract by a body of cotton spinners whereby they mutually bound themselves in effect to carry on their works in conformity with the resolutions of the majority of the body passed in general meeting, and it was held that the contract, being in restraint of trade, was not enforceable in law. The present contract has a precisely similar effect, for by it a trader who buys wholesale is restrained from reselling at a price which will give him a profit. Again, in *Urmston* v. *Whitelegg Brothers* (3), a contract by which the members of a mineral waters association bound themselves not to sell mineral waters at a less price than 9*d.* per dozen, or such other price not being less than 9*d.* per dozen as the committee might from time to time direct, was held to be a contract in restraint of trade, which could not be enforced in a court of law. In the *Mogul Steamship Co.'s Case* (1) there was an

(1) [1892] A. C. 25. (2) (1855) 6 E. & B. 47.
(3) (1890) 63 L. T. 455.

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agreement in the nature of a combination of traders for keeping the trade in Eastern seas in their own hands, and thus regulating prices, and it was held that the contract did not amount to a conspiracy or other legal wrong which could give an outsider a right of action. The question whether the contract was or was not enforceable as between the parties to it was not directly under consideration, but there are intimations of opinion to the effect that it was not, and Lord Hannen, referring to *Hilton* v. *Eckersley* (1), expressly said that in his opinion it was illegal as being in restraint of trade, and could not have been enforced against any of the defendants who might have violated it.

It must be taken, therefore, that this contract is in restraint of trade, and, if so, it is not enforceable unless it falls within the well-recognised exception as being a contract necessary for the reasonable protection of the plaintiffs. It is impossible to contend that it is. If a vendor of goods gets his price he requires no further protection. The object here is not protection of the plaintiffs, but restriction of the ordinary rights of the defendants.

[They referred also to *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (2)]

No reply was called for.

KEKEWICH J. The defendants' point is that they cannot be sued upon this written contract into which they have entered because it is in restraint of trade. In one sense no doubt it is so, because one of the contracting parties is not at liberty under the contract to do what he pleases with the goods which he purchases. But it is necessary to see what the contract really is. The plaintiffs are the manufacturers of Elliman's Royal Embrocation for horses and cattle, and Elliman's Universal Embrocation for human beings. They are not bound to sell the embrocation at all; they are not bound to manufacture it. They are at liberty to do as they please, and when they have manufactured it they are at liberty to sell it at whatever price they choose to fix—it may be a prohibitive one, or it may be

(1) 6 E. & B. 47. (2) [1894] A. C. 535.

such a small price that they cannot make any profit out of it. That is entirely for their consideration. Carrington & Son are minded to buy Elliman's embrocation with a view to selling it again—that is, to buy wholesale in order to sell to others retail, and Ellimans make a bargain with them that they shall not sell it below certain prices—that part of the bargain has not been broken—and that when they sell to others they will procure from those others an agreement that they will not sell it below certain prices. Why should not Messrs. Elliman be at liberty to fix the price in that way? Nobody has argued, and it could not possibly be argued, that they are not at liberty to fix the price on the first sale to Carrington & Son. Why should they not be at liberty to make the further bargain with Carrington & Son that they shall not sell it below a certain price? It is said that it is in restraint of trade. In one sense it is, but it is just as much and no more in restraint of trade for Ellimans to say that they will not sell at all. It seems to me that what is restraint of trade as regards Carrington & Son is really the liberty of trade as regards Ellimans.

The cases which have been cited are well-known authorities expounding a great principle and shewing what exceptions there are to that principle. But this case seems to me not to fall within any principle or exception. I do not think it is touched by the authorities at all. It is merely a question whether a man is entitled when he is selling his own goods to make a bargain as to the use to be made of them by the purchaser. It is said that the contract is against public policy; but that phrase merely embodies, for the present purpose, the great principle of restraint of trade, and to say that it is to prevent Messrs. Elliman from exercising their own discretion seems to me to be applying a well-settled principle of law to facts to which it cannot have any possible application. On the question, therefore, as to the validity of the contract, I am entirely against the defendants.

[His Lordship then dealt with the question as to the form of the relief to be granted, and came to the conclusion that the remedy by injunction was not necessary, inasmuch as Messrs. Elliman had the remedy in their own hands, by refusing to

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supply their embrocation except upon their own terms. There must, however, be judgment for 20*s.* damages against the defendants Carrington & Son, and also against the defendant Crabtree. As the defendants Thompson & Co. had not entered into any agreement with the plaintiffs, the action as against those defendants must be dismissed.]

Solicitors: *Dalston, Son & Elliman; Robbins, Billing & Co., for Charles Mills, Oldham.*

C. C. M. D.

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KEKEWICH J. 1901 *June 6.*

## *In re* SHARMAN. WRIGHT *v.* SHARMAN.

[1901 S. 1507.]

*Will—Construction—"Testamentary Expenses"—Estate Duty payable in respect of Real Estate—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 6; *s.* 8, *sub-s.* 3; *s.* 9, *sub-s.* 1—*Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *s.* 1.

Estate duty payable in respect of real estate is not a "testamentary expense" within the meaning of a direction contained in the will of a testator, who died after the Land Transfer Act, 1897, for payment of his debts, funeral and testamentary expenses, out of his personal estate.

*In re Palmer*, W. N. (1900) 9, followed.

ADJOURNED SUMMONS.

John Sharman, who died on April 18, 1900, by his will dated December 22, 1899, after appointing executors and trustees thereof, devised his real estate to trustees upon certain trusts in favour of his nephew, the defendant George Sharman, for life, and after his decease upon trust for sale and division of the proceeds of sale in manner therein mentioned; and after giving certain pecuniary legacies, the testator bequeathed all the residue of his personal estate, "after payment thereout of all his just debts, funeral and testamentary expenses," to his executors and trustees upon trust for his nephews and nieces, the defendants, George James Sharman, Gertrude Jackson, Martha E. Sharman, Frances E. Sharman, Nelson T. Sharman, and Virginia Sharman.

By a codicil dated March 19, 1900, the testator varied the

appointment of executors and trustees contained in his will, and the plaintiffs, Cardin Wright and James Reed, were thereby constituted executors and trustees of the will and codicil, which were duly proved by them on May 29, 1900.

This summons was taken out for the determination (inter alia) of the question whether the estate duty payable on the decease of the testator in respect of his real estate ought to be paid out of the testator's personal estate or out of the real estate.

*Northcote*, for the plaintiffs, the trustees.

*Bethell*, for the devisees of the real estate. It is submitted that the expression "testamentary expenses" covers the estate duty payable in respect of the real estate. Estate duty is substituted for probate duty, and it was held by Malins V.-C. in *Davies* v. *Fowler* (1) that probate duty is a testamentary expense. In *In re Clemow* (2), it was decided by your Lordship that estate duty was a testamentary expense, and the ground of the decision was that the expression "testamentary expenses" must include every payment which an executor is bound to make in order to obtain probate. The facts in that case were peculiar, but *In re Treasure* (3), is an authority to the same effect, and extends the decision in *In re Clemow* (2) to a clause such as is contained in this will.

Under the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1, all real estate now vests in the executor in the same way as leaseholds previously did, and the estate duty payable in respect of real estate must therefore be payable in the same way as estate duty payable in respect of leaseholds—that is to say, it is payable out of the general personal estate, and is not within s. 9 of the Finance Act, 1894 (57 & 58 Vict. c. 38). *In re Palmer* (4) was a decision as to settlement estate duty, and is therefore not in point.

*Borthwick*, for persons interested in the personal estate. The case depends on the provisions of the Finance Act, 1894. By s. 6, sub-s. 2, it is provided that the executor "shall pay"

(1) (1873) L. R. 16 Eq. 308.
(2) [1900] 2 Ch. 182.
(3) [1900] 2 Ch. 648.
(4) W. N. (1900) 9.

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the estate duty in respect of the personal property on delivering the Inland Revenue affidavit, and "may pay" in like manner the estate duty in respect of any other property which is under his control, or, in the case of property not under his control, if the persons accountable request him to make such payment. The executor, therefore, though empowered to pay the estate duty in respect of the real estate, is not bound to pay it, and can obtain probate without doing so. By s. 9, sub-s. 1, a rateable part of the duty on an estate, in proportion to the value of any property which does not pass to the executor as such is to be a first charge on the property in respect of which the duty is leviable, and by s. 8, sub-s. 3, the executor is made accountable for the estate duty in respect of all "personal property" wheresoever situate of which the deceased was competent to dispose at his death, but no such responsibility is imposed upon him as to the real estate. The principle, therefore, of the decisions in *In re Clemow* (1) and *In re Treasure* (2) shews that the estate duty in respect of the real estate is not a testamentary expense, because it is not an expense necessary to the obtaining of probate, and the very point appears to have been decided by Joyce J. in *In re Jolley*. (3)

The Land Transfer Act, 1897, is a conveyancing Act, and, as clearly appears from s. 2, sub-s. 3, was not intended to affect the incidence of taxation; and *In re Palmer* (4) is an express decision that s. 9, sub-s. 1, of the Finance Act, 1894, must be construed independently of the provisions of the Act of 1897.

*Dunham* and *Mossop*, for other parties.

KEKEWICH J. In this case the testator has in effect directed payment of his just debts and funeral and "testamentary expenses" out of the residue of his personal estate. The real estate is given to trustees upon trusts differing from those declared of the residue, and the neat point therefore arises whether the expression "testamentary expenses" includes the estate duty payable in respect of the real estate. Mr. Bethell, arguing on behalf of the devisees of real estate, relied on my

(1) [1900] 2 Ch. 182.
(2) [1900] 2 Ch. 648.
(3) (1901) 17 Times L. R. 244.
(4) W. N. (1900) 9.

decision in *In re Clemow*. (1) That case had reference to personal estate only, and my decision that "testamentary expenses" in that case included the estate duty was based upon the ground that it was necessary for the executors to pay the duty in order to obtain probate. In the subsequent case of *In re Treasure* (2) I again pointed out that I was dealing entirely with personal estate, and that no question as to real estate entered into consideration.

The argument on the other side is that on the principle of *In re Clemow* (1) the estate duty on the real estate is not a testamentary expense, because it is not required to be paid by the executors in order to obtain probate, and I am referred to the provisions of the Finance Act, 1894, on the point, to the effect that, although the executors may pay the estate duty on the real estate, it is charged on the real estate, and there is no obligation on them to pay it. They may, therefore, obtain probate without paying the estate duty on the real estate, and accordingly it is said that, the principle of *In re Clemow* (1) being applied, the estate duty on the real estate ought not to be treated as a testamentary expense.

The point must have been considered by Joyce J. in *In re Jolley* (3), but so far as I understand his judgment as reported he took pains not to lay down any general law, but accepted the law as decided in previous cases; and I think the safer and sounder way of treating his judgment is to say that it is a decision on the construction of the particular will; but so far as it is an authority at all it certainly is in favour of the real estate bearing its own estate duty.

Applying, therefore, the principle of *In re Clemow* (1) to this case, I think, on this part of the argument, that the expression "testamentary expenses" does not include estate duty payable in respect of the real estate.

Another argument, which deserves consideration, was raised on behalf of the devisees. It is said that since the Land Transfer Act, 1897, real estate passes to the executor as such,

(1) [1900] 2 Ch. 182. (2) [1900] 2 Ch. 648.
(3) 17 Times L. R. 244.

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and therefore the executor is bound to pay the duty, and consequently it is a testamentary expense. Mr. Borthwick has called my attention to the saving clause in s. 2 of the Land Transfer Act, 1897, which may require consideration on another occasion; but I prefer simply to rely on the decision of Buckley J. in *In re Palmer* (1), holding that "the language of s. 9, sub-s. 1, of the Finance Act, 1894, must be construed with reference to the law as it stood at that time, and not in accordance with the provisions of the Land Transfer Act, 1897." That is a clear statement of the opinion of the learned judge, and I feel bound to follow it.

Therefore I hold on both grounds that the estate duty payable in respect of the real estate must be borne by the real estate, and not by the general residuary estate.

Solicitors: *Oldman, Clabburn & Co., for Willders & Son, Holbeach; Mossop & Rolfe.*

(1) W. N. (1900) 9.

C. C. M. D.

## *In re* CLUTTERBUCK. FELLOWES *v.* FELLOWES.

[1901 C. 97.]

BYRNE J.
1901
May 22, 23.

*Will—Direction to accumulate—Purchase of Real Estate—"For the Purchase of Land only"—Accumulations Act*, 1892 (55 & 56 *Vict. c.* 58)—*Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63), *s.* 3.

A direction to accumulate for the purchase of real estate is a direction to accumulate "for the purchase of land only" within the meaning of the Accumulations Act, 1892, and is consequently void.

The definition of "land" in s. 3 of the Interpretation Act, 1889, is not confined to corporeal hereditaments.

Dictum of Chitty J. in *In re Danson*, (1895) 13 The Reports, 633 considered and questioned.

SUMMONS for the determination amongst others of the question whether a trust for accumulation of the income of a portion of the testator's property was valid to any and what extent.

Thomas Clutterbuck by his will dated April 22, 1893, after appointing the plaintiffs his executors and trustees, amongst other devises and bequests devised his mining property unto and to the use of his trustees, upon trust out of the income arising therefrom to pay certain charges therein mentioned, and subject thereto, "upon trust to invest in the parliamentary stocks or funds of the United Kingdom the rents and annual income of my mining property for the period of ten years computed from my death, and during that period to pay the interest arising from such investments to my nephew Algernon Barlow. And I direct that at the expiration of that period the whole of such investments be transferred or paid to my nephew Algernon Barlow if he be living; but if he be dead at such expiration, then the same shall be invested in the purchase of real estate, so as to go along with my estate at Whittle. And, subject to the aforesaid trusts, I direct that my mining property shall be held upon trust for my said nephew Algernon Barlow for his life, with remainder upon trust for his first and

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other sons successively according to seniority in tail, with remainder upon trust for his first and other daughters successively in tail, with remainder upon trust for my own right heirs." And the testator devised his freehold estate at Whittle to the use of the said Algernon Barlow for life without impeachment of waste, with remainder to his first and other sons in tail, with remainder to his first and other daughters in tail, with remainder to his (the testator's) own right heirs.

The testator died in June, 1900. Algernon Barlow, the testator's nephew, was living and had one daughter only, namely, the defendant Essex Eleanor Barlow, an infant, aged seven years.

Algernon Barlow claimed to be immediately entitled to receive the rents of the mining property, on the ground that he was tenant for life subject only to the trust for accumulation, and that in the one event (namely, of his death before the expiration of the period of accumulation) the accumulation was "for the purchase of land only," and void under the Accumulations Act, 1892 (55 & 56 Vict. c. 58), and that in the other event (namely, of his surviving the period of accumulation) it was an accumulation merely for his own benefit.

*Eastwick*, for the trustees.

*Dauney*, for Essex Eleanor Barlow. The only question is as to the construction to be put on the words "for the purchase of land only" in the Accumulations Act, 1892 (55 & 56 Vict. c. 58), which provides that "no person shall, after the passing of this Act, settle or dispose of any property in such manner that the rents, issues, profits, or income thereof shall be wholly or partially accumulated for the purchase of land only, for any longer period than during the minority or respective minorities of any person or persons who under the uses or trusts of the instrument directing such accumulation would for the time being, if of full age, be entitled to receive the rents, issues, profits, or income so directed to be accumulated." The real estate by the will directed to be purchased with the investments need not necessarily be land. The expression "land" in s. 3 of the Interpretation Act, 1889 (52 & 53 Vict.

c. 63), means "corporeal hereditaments": *In re Danson* (1); and, reading that definition into the Accumulations Act, it follows that the direction in the will to invest in real estate which might consist of incorporeal hereditaments is not void as not being within the Accumulations Act.

*Levett, K.C.*, and *A. L. Ellis*, for Algernon Barlow. Algernon Barlow is now tenant for life subject only to a trust for accumulation which in one event is for his own benefit, and in the other event is void as being a direction to accumulate "for the purchase of land only." A direction to accumulate for the purchase of real estate is a direction to accumulate "for the purchase of land only." The Interpretation Act, 1889, enacts in s. 3 that "the expression 'land' shall include messuages, tenements, and hereditaments, houses, and buildings of any tenure." The word "hereditaments" is the widest expression, and includes not only lands and tenements but whatever may be inherited, whether corporeal or incorporeal, and there is no authority for confining the expression "hereditaments" as used in the Interpretation Act to corporeal hereditaments except the dictum of Chitty J. in the case of *In re Danson* (1), which from the context, we submit, must be a slip in the report, and in any event was not necessary to the decision.

*Dauney*, in reply.

*Rowden, K.C.*, and *Gurdon, Carson, K.C.*, and *E. S. Ford, Borthwick*, and *Peterson*, for parties to the action who were not interested in the question, took no part in the argument.

BYRNE J. The question in this case turns upon the true construction to be placed upon the Accumulations Act, 1892, which provides: [His Lordship read the Act, and continued:—] The testator devised his mining property upon trust, after paying certain charges, to invest the rents and annual income thereof in the parliamentary stocks or funds of the United Kingdom for the period of ten years, to be computed from his death, and during that period to pay the interest arising from such investments to his nephew Algernon Barlow. That is, therefore, a partial accumulation that is directed. Then the

(1) 13 The Reports, 633.

BYRNE J. 1901 CLUTTERBUCK, *In re.* FELLOWES *v.* FELLOWES.

testator directs "that at the expiration of that period the whole of such investments be transferred or paid to my nephew Algernon Barlow if he be living; but if he be dead at such expiration, then the same shall be invested in the purchase of real estate, so as to go along with my estate at Whittle."

There is no minor in existence who if of full age would be entitled to receive the rents, issues, and profits so directed to be accumulated, and the question is whether, inasmuch as there is a direction to invest in the purchase of real estate, that direction comes within the vice aimed at by the Accumulations Act, 1892.

In order to ascertain the meaning of the words "for the purchase of land only," we must have recourse to the Interpretation Act, 1889 (52 & 53 Vict. c. 63), to find out what is the true meaning of "land," because, unless a contrary intention appears, the word "land" will have the meaning attributed to it by that Act. Sect. 3 of that Act provides, "The expression 'land' shall include messuages, tenements, and hereditaments, houses, and buildings of any tenure." It is argued that the real estate which by the will is directed to be purchased need not be land. It need not be land in the ordinary sense of the word "land." The question is whether you can find any "real estate" which is not messuage, tenement, or hereditament, house, or building of some tenure or other. Mr. Dauney admitted that he could not point out anything that would be real estate and would not be covered by those words. He could point out certain real estate which is not "land" in the ordinary sense, but none that is not "land" within the meaning to be given to the expression "land" by virtue of the Interpretation Act.

A difficulty has arisen in consequence of a case of *In re Danson* (1), decided by Chitty L.J. when Chitty J., where he is reported as saying: "It is not in my view possible to say that the terms used in the Act of 1889 import 'money to be laid out in the purchase of land.' That could only be effected by an express definition clause. 'Land,' therefore, in the definition of the Interpretation Act, means 'corporeal hereditaments.'

(1) 13 The Reports, 633.

That definition I read into the Act now before me (the Accumulations Act), whose words I consequently find to mean that which they would naturally at first sight appear to mean."

The expression is not necessary for the determination of the case, because, as was pointed out by the learned judge, there you might have a permanent investment in Consols by virtue of the provisions of the Settled Land Act, and the decision would be just as good if the judge had said "land" meant corporeal or incorporeal hereditaments. I think it would be too strong to import into the report of this judgment the meaning sought to be put on it, namely, that land within the meaning of the Accumulations Act, 1892, must mean corporeal hereditaments. The judgment was not, I presume, corrected by the learned judge, and I think there must be a slip in the report.

Under these circumstances, I am of opinion that the direction to lay out the investments at the expiration of ten years, if Algernon Barlow be then dead, in the purchase of real estate is bad. The result is that in any event Algernon Barlow takes the rents so directed to be accumulated.

Solicitors: *Pontifex, Hewitt & Pitt, for Nevinson & Barlow, Malvern; Black & Moss; Oldman, Clabburn & Co., for J. Wilson Gilbert & Co., Norwich; Hardisty, Rhodes & Hardisty.*

G. M.

BYRNE J.
1901
June 6.

## *In re* HARVEY.
## HARVEY *v.* HARVEY.

[1901 H. 768.]

*Real Estate limited in Strict Settlement—Income of Personal Estate to be Paid to A. for Life—On Death of A. Capital to be Invested in Land to be held to the Uses of the Settlement—Disentailing Assurance of Money not yet ascertained—Fines and Recoveries Act*, 1833 (3 & 4 *Will.* 4, *c.* 74), *ss.* 1, 71.

Personal estate the income of which is directed to be paid to A. for life, and the capital of which is on his death directed to be invested in the purchase of land to be settled to the uses of a strict settlement of real estate created by the same instrument, can be effectually disentailed in the lifetime of A. by the tenant in tail under the settlement with the consent of the tenant for life under the settlement.

*Fordham* v. *Fordham*, (1864) 34 Beav. 59, discussed and followed.

SUMMONS for the determination of the question whether according to the true construction of the will of the testator a certain disentailing deed dated July 14, 1870, was effectual to bar the estate tail of the plaintiff Sir Charles Harvey in the residuary personal estate of the testator by his will directed, upon the death of the defendant Edward Kerrison Harvey, tenant for life thereunder, to be invested in real estate to be settled to the same uses as the other real estate devised by his will, and all estates in remainder expectant on the determination of such estate tail.

General Sir Robert John Harvey by his will, dated January 22, 1852, devised all his freehold messuages, lands, tenements, and hereditaments to trustees, as to a portion of the hereditaments to the use of his wife Dame Charlotte Mary Harvey and her assigns during her life or widowhood, and as to all the rest of the hereditaments to the use of the trustees for the term of five years from the day of his decease upon trusts for raising the sum of 20,000*l.*, and after the expiration or other sooner determination of the said term of five years concerning all the same hereditaments, and from and after the decease or marriage

of his wife, as to the hereditaments devised to her during her widowhood, to the use of his (the testator's) eldest son Robert John Harvey Harvey for life, with remainder to the use of Robert Lambart Sutton Harvey, the eldest son of R. J. H. Harvey, for life, with remainder to the use of his first and other sons in tail male, with remainder to the use of the second and every other son of the said R. J. H. Harvey severally and successively in tail male, and for default of such issue to the use of the testator's second son John Harvey for life, with remainder to the use of his first and other sons in tail male, and in default of such issue to the use of the testator's third son, the defendant Edward Kerrison Harvey, for life, with remainder to his first and other sons in tail male, and in default of all such issue to the use of the testator's daughters and the daughters of his several sons as therein mentioned, and in default of all such issue to the use of the testator's own right heirs. And the testator gave and bequeathed all the rest and residue of his personal estate and effects (subject as therein mentioned) to his trustees upon trust to convert the same into money, and to invest the moneys to arise from such conversion and to pay the annual income thereof for the benefit of his sons John Harvey and Edward Kerrison Harvey in equal shares during their joint lives, and, upon the decease of either of them, to pay the whole to the survivor for life, and upon the death of such survivor upon trust to convert all his residuary personal estate into money, and lay out and invest the moneys arising from such sale and conversion in the purchase of freehold or copyhold lands, tenements, and hereditaments to be conveyed and assured to the trustees to such of the uses and for such of the trusts, intents, and purposes, and subject to such of the powers, provisoes, and declarations thereinbefore limited and expressed from and after the determination of the said term of five years of and concerning his real estate comprised in the same term as should be then subsisting and capable of taking effect.

By a codicil dated May 31, 1855, the testator revoked the trusts in his will declared of one moiety of the annual income of his residuary personal estate in favour of his son John

BYRNE J. 1901 HARVEY, *In re.* HARVEY *v.* HARVEY.

Harvey, and declared that the whole of the annual income should be paid to his son Edward Kerrison Harvey for life, and after his death the whole of the residuary personal estate should remain and be upon the trusts in the will mentioned concerning the same.

The testator died January 18, 1860, and his widow died March 23, 1869. The said Robert Lambart Sutton Harvey died September 4, 1864, an infant and unmarried, leaving the plaintiff Sir Charles Harvey, then Charles Harvey, the second and eldest surviving son of the said R. J. H. Harvey, surviving.

By an indenture dated July 14, 1870, and made between the said R. J. H. Harvey, then Sir R. J. H. Harvey, of the first part, the plaintiff of the second part, and trustees of the third part, after reciting that the said Sir R. J. H. Harvey and the plaintiff were desirous of barring the estate in tail male of the plaintiff in the hereditaments devised by the said will and in the moneys to arise from the conversion of the residuary estate of the said Sir Robert John Harvey on the death of the said Edward Kerrison Harvey, by the will directed to be invested in the purchase of lands to be settled as before mentioned, and all remainders over, the plaintiff, with the consent of the said Sir R. J. H. Harvey, as protector of the settlement, barred the estate tail in all the freehold lands devised by the said will; and it was thereby also witnessed that the said Sir R. J. H. Harvey and the plaintiff assigned to the trustees all and singular the moneys to arise on the death of the defendant Edward Kerrison Harvey from the conversion and getting in of the residuary personal estate of the testator, and all and every other sums of money subject to be laid out then or thereafter in the purchase of lands or hereditaments to be settled, so that the said Sir R. J. H. Harvey would have therein an estate for life with remainder to the plaintiff in tail male or in tail general, and the stocks, funds, or securities in or upon which such sum or sums of money were, was, or might be invested, to hold the same freed and absolutely discharged from the estate in tail male of the plaintiff and all remainders over upon such trusts and with and subject to such powers, provisoes, agreements, and declarations as the said Sir R. J. H.

Harvey and the plaintiff should as therein mentioned jointly appoint.

By another indenture of the same date and between the same parties, after reciting that doubts had been entertained whether under the provisions of the Act for the abolition of fines and recoveries the above-mentioned indenture could operate so as to effectually bar the entail in the moneys subject to be invested in the purchase of lands to be settled, so that the said Sir R. J. H. Harvey would have an estate for life with remainder to the plaintiff in tail male, by reason of the said Edward Kerrison Harvey being then alive, the said Sir R. J. H. Harvey and the plaintiff covenanted with the trustees that within one calendar month after the death of the said Edward Kerrison Harvey they would execute and do every such assurance and thing for the further or more perfectly barring the entail of the plaintiff, and all remainders over in the said residuary moneys subject to be invested in the purchase of land.

By an indenture of resettlement, also dated July 14, 1870, Sir R. J. H. Harvey and the plaintiff, in exercise of the power given to them by the disentailing assurance of even date therewith, appointed the freehold lands and hereditaments devised by the will of Sir R. J. Harvey to the use of Sir R. J. H. Harvey for life, and after his death to the use of the plaintiff for life, and after his death to the use that if Jane Anne Harvey, the wife of the plaintiff, should survive Sir R. J. H. Harvey and the plaintiff, she should receive during her life the rent-charges therein mentioned, and subject thereto to the use of trustees for the terms of years therein mentioned to secure payment of the rent-charges and for portions for the younger children of the plaintiff, and subject thereto to the use of the first and other sons of the plaintiff successively and according to seniority in tail with remainders over. And the said indenture contained powers of sale and exchange and provisions for investing the moneys payable upon any such sale or exchange in the purchase of freehold or copyhold hereditaments, with directions for settling the same to the uses upon the trusts and subject to the powers thereinbefore expressed and declared. And Sir R. J. H. Harvey and the plaintiff appointed that

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the moneys to arise on the death of the defendant Edward Kerrison Harvey from the conversion and getting in of the residuary personal estate of the testator Sir R. J. Harvey, and all and every other sums and sum of money subject to be laid out then or thereafter in the purchase of lands or hereditaments to be settled, so that had not the said disentailing deed of even date therewith been executed the said Sir R. J. H. Harvey would have had therein an estate for life with remainder to the plaintiff in tail male or tail general, and the stocks, funds, or securities in or upon which such sum or sums of money were, was, or might be invested should immediately upon the execution of that indenture be held upon the trusts and subject to the powers thereinbefore declared and contained of and concerning the moneys to arise by the sale under the power of sale thereinbefore contained of any of the hereditaments thereinbefore appointed, and the stocks, funds, and securities in or upon which such moneys were thereinbefore authorized to be invested.

Sir R. J. H. Harvey died July 19, 1870, and Jane Anne Harvey, the wife of the plaintiff, died December 13, 1891.

The defendant Charles Robert Lambart Edward Harvey was the eldest son of the plaintiff, and was born April 16, 1871.

John Harvey, mentioned in the will and codicil of the testator, died June 23, 1874, without ever having had any issue.

The question raised was whether where money is bequeathed by will upon trust for investment and payment of the income to A. for life, and on his death upon trust to lay out the moneys in the purchase of land to be settled on B. for life, with remainder to C. in tail with remainders over, B. and C. can during the life of A. effectually bar C.'s entail and the remainders over.

*Levett, K.C.*, and *Martelli*, for the plaintiff Sir Charles Harvey. The question turns upon the true meaning to be put on s. 71 of the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), which enacts that money subject to be invested in the purchase of lands to be settled, so that any person if the lands were purchased would have an estate tail therein, shall for all purposes

of this Act be treated as the lands to be purchased, and be considered subject to the same estates as the lands to be purchased would if purchased be actually subject to. Sect. 1 enacts that, "The expression 'money subject to be invested in the purchase of lands' shall include money, whether raised or to be raised, and whether the amount thereof be or be not ascertained, and shall extend to stocks and funds, and real and other securities, the produce of which is directed to be invested in the purchase of lands." We submit that the "money" referred to in s. 71, having regard to the definition in s. 1, is not confined to money presently to be laid out in the purchase of lands, but includes moneys which may hereafter be laid out in the purchase of lands. This case is governed by the case of *Fordham* v. *Fordham* (1), and cannot be distinguished from it; and, therefore, we submit that the disentailing assurance of July 14, 1870, was effectual to bar the entail in the moneys which on the death of Edward Kerrison Harvey were directed to be laid out in the purchase of lands.

*Cozens-Hardy*, for the defendant C. R. L. E. Harvey, the infant tenant in tail under the resettlement, adopted the same argument.

*Dauney*, for Edward Kerrison Harvey and his eldest son. The word "money" in s. 71 applies to money presently to be invested in the purchase of lands, and not to moneys hereafter to be laid out. The section cannot apply to lands which could not be purchased till after the death of Edward Kerrison Harvey. The words in the interpretation clause, "money whether raised or to be raised," mean money raised or then at the time raisable. I submit that the decision in *Fordham* v. *Fordham* (1) is wrong, and ought not to be followed.

*J. M. Paterson*, for the trustees of the will.

*Levett, K.C.*, in reply.

BYRNE J. In this case the short question raised is whether a disentailing deed is effectual to bar an estate tail in lands to be purchased with certain moneys subject to a trust, after the

(1) 34 Beav. 59.

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death of a person who was at the date of the disentailing deed still alive, to be laid out in the purchase of lands.

Under the will there was a strict settlement of certain real estate. About that no question arises: the deed executed was effectual to bar the estate tail in that real estate. Then the testator deals with his personal estate, and he gives that subject to the payment of his debts and certain legacies and annuities to trustees. [His Lordship read the trust of the personal estate above set out, and proceeded:—]

The disentailing deed was executed, as I have said, during the lifetime of Edward Kerrison Harvey. It was executed by the tenant in tail with the consent of the person who, if Edward Kerrison Harvey had died and the money had been laid out in land, would have been tenant for life of the land so purchased. The whole question argued before me is as to whether that was effectual, having regard to the fact that this money was not immediately subject to be invested in the purchase of land, but only subject to be invested in the purchase of land after the death of Edward Kerrison Harvey.

Now, the sections of the Fines and Recoveries Act which have been referred to are, first of all, the interpretation clause, s. 1, where, amongst other definitions, the definition of moneys subject to be laid out in land is given; and such moneys are there defined to include money whether raised or to be raised, and whether the amount thereof be or be not ascertained, "and shall extend to stocks and funds, and real and other securities, the produce of which is directed to be invested in the purchase of lands."

The 71st section provides, so far as is material, that "money subject to be invested in the purchase of lands to be settled so that any person, if the lands were purchased, would have an estate tail therein, shall for all the purposes of this Act be treated as the lands to be purchased, and be considered subject to the same estates as the lands to be purchased would, if purchased, have been actually subject to." Then, passing over certain words, the section continues: "And shall, in the case of money subject to be invested in the purchase of lands to be so settled

as aforesaid, apply to such money in the same manner as if such money were directed to be laid out in the purchase of freehold lands, and such lands were actually purchased and settled."

Mr. Dauney argued the point very neatly. He said the whole question is whether the words in the 71st section refer to moneys presently subject to be laid out in the purchase of land, or whether they mean subject either presently or at any future time to be laid out in the purchase of land. First, it is to be observed that the words in the Act are perfectly general. There is this further fact I may mention—that under s. 15 of the Act there is a provision for disentailing estates tail, whether in possession, remainder, contingency, or otherwise, so that the Act is not contemplating merely the disentailing of estates in possession.

Now on the words of the section, independently of authority, I should have come to the conclusion that it would be too narrow a reading to say that these words are to be confined to moneys presently subject to be laid out in the purchase of land. But I think the case is really covered by the case of *Fordham* v. *Fordham* (1), to which I have been referred. The circumstances in the two cases are not, of course, exactly the same; but still I think that case is an authority which governs the present one in principle, although the words are different.

In that case the testator gave his freeholds, copyholds, and leaseholds to trustees, and he directed them to enfranchise the copyholds within twenty years. And as to his freeholds, copyholds, and leaseholds to be purchased as after mentioned, he declared his will to be that his trustees should "enter into the possession and receipt of the rents, issues, and profits of the same estates, and should, until the expiration of twenty-one years after his decease," manage and pay the expenses and outgoings; and he directed his trustees to apply the surplus of his personal estate, and of the rents, &c., in payment of certain expenses of management and improvement, and to invest the surplus in the purchase of freeholds; and in the meantime to invest and accumulate the same, the accumulations to be

(1) 34 Beav. 59.

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subject to the trusts thereby declared of the fund from which the same should have proceeded. The testator continued as follows: "I declare my will to be, that from and after the expiration of twenty-one years from my decease, my trustees shall stand seised of and interested in all my said freehold estates and all the freehold estates into which my said copyhold estates shall be converted by enfranchisement, and the freehold estates hereinbefore directed to be purchased by my trustees, upon the trusts following, that is to say:—Upon trust for Frederick Nash Fordham of Royston, in the county of Hertford, banker, during his life, without impeachment of waste, with remainder upon trust for the sons of the said Frederick Nash Fordham successively, according to seniority, in tail male," with remainders over. The testator died in 1855. Frederick Nash Fordham had one son, who attained twenty-one on November 11, 1863, and on the following day he, with the concurrence of his father, joined in disentailing, amongst other things, "all the money which, under the trusts of the will, was subject to be invested in the purchase of land, including money whether invested or to be invested, and whether the amount thereof was or was not ascertained." On behalf of the trustees Mr. Archibald Smith argued that inasmuch as before the passing of the Act money could not have been disentailed before it was received, the statute 3 & 4 Will. 4, c. 74, did not alter the law in that respect; and he referred to s. 71, which enables a tenant in tail to acquire the absolute interest in "money subject to be invested in the purchase of lands to be settled," and said that the meaning of the word "money" was governed by the interpretation clause (s. 1), which applied to money in hand, and did not include money which might thereafter be received. So that the precise point taken in the present case was taken by Mr. Archibald Smith in arguing that case. Lord Romilly M.R. said (1): "The plaintiffs are clearly entitled to have the rents of the present year paid to them, and it is quite unnecessary to invest them in land. The same thing will happen in 1865 and in every succeeding year, and during the whole remaining period of twenty years they will, from

(1) 34 Beav. at p. 62.

time to time, be absolutely entitled to have the annual rents paid to them. I am of opinion that the words of the statute are clear, and that they enable the tenant in tail to acquire an absolute right to any 'money subject to be invested in the purchase of lands to be settled,' including money received or to be received and the rents of this and of every succeeding year. As the plaintiffs would be entitled to have the rents paid to them every year, and there is no possibility of investing them in land, nobody else has any interest in them, and they are entitled to an immediate conveyance." If they were entitled to an immediate conveyance, that would only be upon the footing that the disentailing deed was effectual, not merely to bar the entail in the moneys already received, and liable to be invested in land, but in respect of moneys thereafter to be received, and then to be invested in land.

I have not been referred to any authority suggesting that *Fordham* v. *Fordham* (1) is not good law, and it is treated in Davidson's Precedents, 3rd ed. vol. iii. Pt. II. p. 1302, as a binding authority. I must, therefore, treat it as being so, and I am of opinion it governs this case. The declaration will be that according to the true construction of the will of the testator, and in the events which have happened, the above-mentioned disentailing assurance of July 14, 1870, was effectual to bar the entail in the moneys upon the death of Edward Kerrison Harvey directed to be laid out in the purchase of land.

Solicitors: *Iliffe, Henley & Sweet, for Preston & Son, Norwich; Blake, Heseltine, Child & Crailsheim, for Bensly & Bolingbroke, Norwich; Collyer-Bristow, Hill, Curtis & Dods, for Mills & Reeve, Norwich.*

(1) 34 Beav. 59.

G. M.

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*March* 21, 22; *April* 26.

## UNION LIGHTERAGE COMPANY *v.* LONDON GRAVING DOCK COMPANY.

[1900 U. 467.]

*Easement—Implied Reservation on Conveyance of Tenement alleged to be servient—Enjoyment* clam—*Right to support of Dock Sides by Rods fastened in adjoining Owner's Land.*

In 1861 G. owned in fee simple two adjoining pieces of land (X. and Y.) on the riverside at Blackwall. Plot X. was let to tenants and Plot Y. was in G.'s own occupation. G. in the same year having constructed a graving dock, with wooden sides, on Y., by arrangement with the tenants of X. carried rods or ties through the boundary fence under the surface of X. for about 15 feet, where the rods were fastened to piles by nuts. The rods were not visible on X., nor were the piles or nuts save as below mentioned.

In 1877 both properties were in hand, and G.'s successors in title conveyed X. to the plaintiffs by a deed in common form containing no express reservation of the right of support, and in 1886 G.'s successors conveyed Y. to the defendants' predecessors in title. In 1900 the plaintiffs, in excavating with a view to improving their property, first became aware of the existence of the rods. Two nuts on the outside of piles were also occasionally visible. No ordinary person conversant with riverside property would necessarily have inferred that the nuts supported the dock. For a timber dock as described above it was reasonably necessary to support it by the means actually adopted, but if a concrete wall had been placed on the side nearest X. it would have been unnecessary to place any means of support in X.:—

*Held*, (1.) that there was no implied reservation of the right to support when X. was conveyed to the plaintiffs; (2.) that the support had been enjoyed *clam*—that is to say, without the plaintiffs' knowledge and not in such a way that their attention ought reasonably to have been drawn to it, although there had been nothing surreptitious or actively concealed—and therefore that no easement had been acquired; and (3.) that the plaintiffs were entitled to remove the means of support although the result would be to cause the dock to collapse.

In 1860 Henry Green was the owner in fee simple of some riverside property at Blackwall. The western part was used as a wharf and shipbuilding yard, and was in the occupation of Messrs. Freeman as tenants. The eastern part was in the occupation of Green himself. In the same year he employed contractors to construct a graving dock on his own premises.

It was constructed with timber sides, the underground supports or ties being placed on the eastern side of the boundary fence dividing the two portions of the property. Signs of weakness soon appeared, and in order to make the dock secure Green, in or about 1861, under some arrangement with his tenants, Messrs. Freeman, carried rods or ties through the boundary fence under the wharf to a distance of about 15 ft. 6 in., piles being placed there, and the rods or ties being fastened to the piles by nuts. The rods or ties were not visible under the wharf, nor, except to the extent below mentioned, were the piles or nuts visible.

In 1877, Green having died, and both the properties being in hand, the persons entitled under his will conveyed the wharf premises to the plaintiffs, who carried on business there up to the commencement of the present action. The conveyance was in the ordinary form, and contained no express reservation of any right of support. In 1886 Green's devisees sold the dock premises to a company, which subsequently sold the premises to the defendants, who carrried on business there up to the commencement of the action. This conveyance also was in common form, and was silent as to support. In 1892 the defendants concreted the bottom and a small part of the side of their dock, but, with this exception, the timber remained as before. In 1900 the plaintiffs, in the course of excavations, with a view to improving their property, came across a number of rods and ties, which were those which were placed there in 1861.

The following statement as to the evidence was made by Cozens-Hardy J. in his judgment:—

"Evidence has been adduced which satisfies me on several points. (1.) For a timber dock of this nature it was reasonably necessary to have underground rods and ties extending beyond the division fence between the two properties. This was proved by actual experience in 1860, and Mr. Jefferey, whose testimony was in no way shaken, states that the proper distance for safety, though it might vary slightly, having regard to the nature of the soil, is for a dock of this depth 33 feet from the side, and this is about the distance adopted in 1861. (2.) If

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instead of a timber dock a concrete wall had been placed on the western side of the dock it would not have been necessary to go beyond the boundary fence. (3.) The plaintiffs, when they purchased in 1877, in fact had no knowledge of the existence of the rods or ties under their land, and they were not aware of their existence until 1900. In saying this I refer to the directors and managers of the plaintiff company. (4.) There are now visible on the western side of the camp-sheathing (1) which holds up the side of the wharf and, a few inches above the slip, two nuts on the outside of piles. These are nuts and piles placed there in 1861. These nuts are not always visible, and are not of such a nature as to attract attention. In fact the directors and the present manager had not noticed them until 1900. (5.) Although a skilled expert informed of the nature of the dock might have concluded that these nuts had to do with the support of the dock, no ordinary person conversant with riverside property would necessarily have arrived at this conclusion, for they might very probably have served to support the camp-sheathing and the wharf behind it. (6.) If the plaintiffs remove the ties it is probable that the dock side will give way."

The question to be decided by the Court at the trial of the action was whether the defendants were entitled, as against the plaintiffs, to have the support of these rods and ties, and to prevent the plaintiffs from interfering with them as might seem requisite for the purpose of their business.

The action was tried by Cozens-Hardy J. on March 21 and 22, 1901.

*Hon. E. C. Macnaghten, K.C.*, and *Bryan Farrer*, for the plaintiffs. The defendants claim a right to the support of their dock by means of the ties running through and supported in the land of the plaintiffs. The conveyance to the plaintiffs is in the ordinary form, and does not contain any express reservation of the right to support.

(1) [There is no standard spelling of this obscure word: see the Oxford English Dictionary, *s.v. Camp-shedding* (which represents the usual pronunciation) and *Camp-shot*.—F. P.]

An express reservation is necessary to support the defendants' case if it is rested on the deeds; for there is no implied reservation of a right to support: *Suffield* v. *Brown* (1); *Crossley & Sons* v. *Lightowler* (2); *Wheeldon* v. *Burrows*. (3)

The only other ground on which the defendants can claim the right to support is that they have acquired an easement. To support their case on that ground they must shew that they have enjoyed the right continuously, peacefully, and openly.

If it has been enjoyed continuously and peacefully, it is because the plaintiffs were unaware of the existence of the ties and supports. They have in fact only recently discovered their existence, and a man of ordinary intelligence could not be expected to know of their existence.

It is clear that an easement cannot be acquired *clam*: *Solomon* v. *Vintners' Co.* (4); *Dalton* v. *Angus*. (5) The defendants have no greater rights than their predecessors in title had, and if the predecessors had desired to derogate from their grant to the plaintiffs, they would have had to shew that the easement was of necessity and visible.

[They also referred to *Moody* v. *Steggles* (6), *Broomfield* v. *Williams* (7), and *Daniel* v. *Anderson*. (8)]

*Eve*, *K.C.*, and *Peterson*, for the defendants. On the conveyance in 1877 to the plaintiffs there was an implied reservation to the grantors of the right to have the side of the dock supported by the then existing means. A wooden dock can only be supported by these or similar means, and the existence of the ties and rods must have been known to everybody. There was therefore an open and continuous easement of necessity in respect of which class of easement there may be an implied reservation: *Wheeldon* v. *Burrows*. (3)

From the time when the ownership of the two properties was severed the prescriptive period began to run, and either under the Prescription Act or under the doctrine of presumption of a lost grant the defendants have acquired an easement,

(1) (1864) 4 D. J. & S. 185.
(2) (1867) L. R. 2 Ch. 478.
(3) (1879) 12 Ch. D. 31.
(4) (1859) 4 H. & N. 585, 602.
(5) (1881) 6 App. Cas. 740, 801, 827.
(6) (1879) 12 Ch. D. 261.
(7) [1897] 1 Ch. 602.
(8) (1862) 31 L. J. (Ch.) 610.

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even though no reservation of an easement can be implied. The plaintiffs can only escape from this conclusion by shewing that the easement has been enjoyed *clam*. But to say that the easement cannot be acquired *clam* means that it must not be enjoyed surreptitiously. There was no concealment in the present case, and mere want of knowledge on the part of the owner of the servient tenement is not sufficient to constitute enjoyment *clam*: *Gray* v. *Bond*. (1) If a man does not go on his land for over twenty years, during which an easement is set up openly, he cannot be heard to say that he did not know what was going on. In the present case the plaintiffs ought to have known of the existence of the ties and rods.

*Hon. E. C. Macnaghten, K.C.*, in reply.

*Cur. adv. vult.*

April 26. COZENS-HARDY J. This action raises a difficult question as to the right of support to a dry dock. The material facts are as follows: [His Lordship stated the facts and referred to the evidence as above stated, and continued:—]

Under these circumstances the defendants contend, first, that on the conveyance of 1877 to the plaintiffs there was an implied reservation of a right to the then existing support to the dock; and, secondly, that even if there was no such implied reservation the defendants have acquired a right to the easement of support by reason of actual enjoyment for more than twenty years since 1877. The plaintiffs deny that there was any implied reservation, and they deny that any easement can have been acquired, because the enjoyment has not been of such a nature as to entitle the defendants to an easement either under the Prescription Act or under the presumption of a lost grant. On the first point I am clearly of opinion that there was no implied reservation in favour of the vendors when the wharf was conveyed to the plaintiffs in 1877. The judgment of Lord Westbury in *Suffield* v. *Brown* (2), followed by the judgment of Lord Chelmsford in *Crossley & Sons* v. *Lightowler* (3), has been distinctly adopted by the Court of Appeal in the leading case of

(1) (1821) 2 Brod. & B. 667; 23 R. R. 530.

(2) 4 D. J. & S. 185.

(3) L. R. 2 Ch. 478.

*Wheeldon* v. *Burrows*. (1) It seems to me that, in a case like this, the vendors must expressly reserve any such right, and that the purchaser is, in the absence of express reservation, entitled to rely upon the plain effect of the conveyance executed by the vendors. The second point, however, involves much more difficulty. There has been a continuance for upwards of twenty years of these rods and ties under the plaintiffs' land, and I think a right has been acquired, either under the Prescription Act, or under the common law doctrine of a lost grant, unless it can be held that the easement has been enjoyed not openly but *clam*. By *clam* I do not understand fraudulently or surreptitiously. It is sufficient that the easement has not come to the knowledge of the plaintiffs, and is not of such a nature that their attention ought reasonably to have been drawn to it. The authorities bearing on the point are not numerous, and it will be convenient to refer to them shortly. In *Solomon* v. *Vintners' Co.* (2) a right of support was claimed by the plaintiff as owner of a house against the owner, not of the adjacent house, but of the house against which the adjacent house leaned, and by which it and the plaintiff's house were, in fact, supported. Bramwell B. said (3): "Supposing it does exist it must be either as a matter of absolute right, or as a matter of prescription, or under the Prescription Act, or as founded on some supposed lost grant. In any of these cases it can only exist if the benefit was one that was enjoyed as of right, which cannot be unless it was openly and visibly enjoyed. An enjoyment must neither be *vi*, *precario*, nor *clam*; it must be open. Now when one house visibly leans towards another, a person may make a tolerably shrewd guess that it is partly supported by the other; but it will be only a conjecture. No one can say but that both may have slipped and both stand. I think the expression is, 'upon the square,' self-supporting. But it may turn out to be the fact, that the house which leans towards the other, affords as much support to that other by their mutual cohesion as the other affords to it. In fact it is impossible to say which house is being supported. It is true that in this case

(1) 12 Ch. D. 31.
(2) 4 H. & N. 585.
(3) 4 H. & N. 602.

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when the defendants' house was removed the plaintiff's house fell in; but probably nobody who saw the block of buildings would have guessed that such a result would have followed. If any one had done so it would have been but a matter of conjecture. Therefore, supposing that the plaintiff, for more than twenty years, had an enjoyment which he says now ought to continue, it was an enjoyment *clam*, not open, and consequently not as of right." This judgment plainly interprets *clam* in the sense which I have adopted. "Consent or acquiescence," said Thesiger L.J. in delivering the judgment of the Court of Appeal in *Sturges* v. *Bridgman* (1), "of the owner of the servient tenement lies at the root of prescription, and of the fiction of a lost grant, and hence the acts or user, which go to the proof of either the one or the other, must be, in the language of the civil law, *nec vi, nec clam, nec precario*; for a man cannot, as a general rule, be said to consent or to acquiesce in the acquisition by his neighbour of an easement through an enjoyment of which he has no knowledge, actual or constructive, or which he contests and endeavours to interrupt, or which he temporarily licenses." This seems to adopt the same view. In the leading case of *Dalton* v. *Angus* (2) there was a remarkable difference of opinion among the judges who attended the House of Lords, and also among the Law Lords, as to the nature and legal origin and limits of the right of support. Lord Selborne says (3): "The inquiry on this part of the case is, as to the nature and extent of the knowledge or means of knowledge which a man ought to be shewn to possess, against whom a right of support for another man's building is claimed. He cannot resist or interrupt that of which he is wholly ignorant. But there are some things of which all men ought to be presumed to have knowledge, and among them (I think) is the fact, that, according to the laws of nature, a building cannot stand without vertical or (ordinarily) without lateral support. When a new building is openly erected on one side of the dividing line between two properties, its general nature and character, its exterior and much of its interior structure,

(1) (1879) 11 Ch. D. 852, 863. (2) 6 App. Cas. 740.
(3) 6 App. Cas. 801.

must be visible and ascertainable by the adjoining proprietor during the course of its erection. When (as in the present case) a private dwelling-house is pulled down, and a building of an entirely different character, such as a coach or carriage factory, with a large and massive brick pillar and chimney-stack, is erected instead of it, the adjoining proprietor must have imputed to him knowledge that a new and enlarged easement of support (whatever may be its extent) is going to be acquired against him, unless he interrupts or prevents it. The case is, in my opinion, substantially the same as if a new factory had been erected, where no building stood before. Having this knowledge, it is, in my judgment, by no means necessary that he should have particular information as to those details of the internal structure of the building on which the amount or incidence of its weight may more or less depend. If he thought it material, he might inquire into those particulars, and then if information were improperly withheld from him, or if he received false or misleading information, or if anything could be shewn to have been done secretly or surreptitiously, in order to keep material facts from his knowledge, the case would be different. But here there was no evidence from which a jury could have been entitled to infer any of these things. Everything was honestly and (as far as it could be) openly done, without any deception or concealment. The interior construction of the building was, indeed, such as to require lateral support, beyond what might have been necessary if it had been otherwise constructed. But this must always be liable to happen, whenever a building has to be adapted to a particular use. The knowledge that it may or may not happen is in my opinion enough, if the adjoining proprietor makes no inquiry. I think, therefore, that in this case the kind and degree of knowledge which the adjoining proprietor must necessarily have had was sufficient; that nothing was done *clam*, and that the evidence did not raise any question on this point which ought to have been submitted to the jury." These observations of Lord Selborne indicate the great difficulty of applying the word "*clam*" to the circumstances of any particular case. Lord Blackburn says (1): "The edict of the

(1) 6 App. Cas. 827.

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Prætor that possession must not be *vi vel clam*, as I think, is so far adopted in English law that no prescriptive right can be acquired where there is any concealment, and probably none where the enjoyment has not been open." This is not so clear an expression of opinion as that of Bramwell B. (1), but I do not think it really differs from the view of Bramwell B. The question for my decision, therefore, seems to be this—Was the dock a structure of such a nature that the plaintiffs ought to have assumed that it must have had artificial supports extending under their wharf? Or, in other words, can the plaintiffs be heard to say in truth they did not know of the existence of these artificial supports? Now, no doubt the plaintiffs knew there was a dock on the east side of their high boundary fence, not coming quite up to that fence, but some 17 feet or 18 feet distance from it. They did not know of the artificial supports to the dock which extended under their land. I cannot hold that they ought to have known that the dock must have been thus supported. Messrs. Green and their contractor in 1860 apparently thought that adequate support would be obtained by means of ties not extending beyond the boundary fence, and it does not seem reasonable to attribute to the plaintiffs such special knowledge as an expert might possess, but which an ordinary man of business would not possess. Nor do I think that the two nuts, which are visible on the plaintiffs' premises, even if observed, suffice to give notice of the existence of the ties. They are 15 ft. 6 in. from the boundary fence, and a few inches above the surface of the slip. So far as I can judge from a photograph, they would naturally be regarded only as connected with the camp-sheathing on the side of the plaintiffs' wharf. They would not suggest, except possibly to a skilled expert, that they were connected with two of a series of iron ties under the plaintiffs' wharf supporting the distant dock. In the present case there has been nothing surreptitious, no active concealment, but on the other hand there has been no open and visible enjoyment of the easement claimed. This special and unusual support, by means of iron ties beneath the surface of the plaintiffs' land, is not, in my opinion, such as can be claimed merely by twenty years' enjoyment without the

(1) 4 H. & N. 602.

knowledge of the plaintiffs. The result is that I must declare that the defendants are not entitled to retain any of the rods, ties, or supports in or under the plaintiffs' land for the purpose of upholding or supporting the defendants' dry dock, and are not entitled to interfere with the removal by the plaintiffs of all or any of such rods, ties, or supports. An injunction is not asked for, and I imagine these declarations will be sufficient, but I give liberty to apply. The defendants must pay the costs of the action.

Solicitors for plaintiffs: *Renshaw, Kekewich & Smith.*
Solicitors for defendants: *Drake, Son & Parton.*

F. E.

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## UNDERWOOD *v.* LONDON MUSIC HALL, LIMITED.



[1901 U. 288.]

*Company—Memorandum of Association—Preference Shares—Alteration of Holders' Rights—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 8, 12.

The memorandum of association of a company divided its capital into preference and ordinary shares, and provided as follows: "Such preference shares shall confer a right to a fixed cumulative preferential dividend at the rate of 7*l.* per centum per annum. Any shares of the present or any increased capital of the company may be guaranteed or have any special privilege or advantage, or may be deferred, and may be issued on such special conditions as to priority or postponement, either for dividends or repayment of principal, or as to voting power, and generally in such terms as the company may from time to time determine":—

*Held*, that the company could on increasing its capital issue further preference shares ranking pari passu with the original preference shares.

CLAUSE 5 of the memorandum of association of the London Music Hall, Limited, was as follows: "The capital of the company is 60,000*l.*, divided into 6000 preference shares of 5*l.* each, and 6000 ordinary shares of 5*l.* each. Such preference shares shall confer a right to a fixed cumulative dividend at the rate of 7*l.* per centum per annum. Any shares of the present or any increased capital of the company may be guaranteed or have any special privilege or advantage, or may be deferred, and may be issued on such special conditions as to

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priority or postponement, either for dividends or repayment of principal, or as to voting power, and generally in such terms as the company may from time to time determine."

The material clauses of the articles of association were as follows:—

"10. The capital of the company is 60,000*l.*, divided into 6000 preference shares of 5*l.* each and 6000 ordinary shares of 5*l.* each.

"11. If the company shall be wound up the surplus assets shall be applied first in repaying to the holders of the preference shares the amount paid up thereon in priority to the ordinary shares, and each class of shares shall be respectively entitled to rank for dividend in the manner hereinafter declared."

"41. Whenever the capital by reason of the issue of preference shares or otherwise is divided into different classes of shares, all or any of the rights and privileges attached to each class may be modified by agreement between the company and any person proposing to contract on behalf of that class, provided such agreement is confirmed by an extraordinary resolution passed at a separate general meeting of the holders of shares of that class."

"99. The profits of the company available for dividend shall be applied first in payment of a cumulative dividend at the rate of 7 per cent. per annum on the amount paid or credited as paid on the original preference shares."

The whole of the original capital, both preference and ordinary, was issued.

The company desired to increase its capital by creating 4000 preference shares of 5*l.* each, which were to rank pari passu with the original preference shares, and 4000 ordinary shares of 5*l.* each, which were to rank pari passu with the original ordinary shares, and at a meeting of the directors on May 1, 1901, a resolution was passed that a meeting of the shareholders should be summoned to pass the following proposed resolution: "That the capital of the company be increased to 100,000*l.* by the creation of 4000 preference shares of 5*l.* each to rank pari passu with the existing preference shares of the company, and 4000 ordinary shares of 5*l.* each."

H. T. Underwood, one of the directors of the company, brought the present action, on behalf of himself and all other the holders of the preference shares, against the company and the other directors, for (1.) a declaration that it was ultra vires for the company to increase its authorized capital by creating preference shares ranking in priority to or pari passu with the 6000 preference shares mentioned in clause 5 of the memorandum of association; and (2.) an injunction to restrain the defendants (other than the company) and each of them from convening or holding any meeting of the members of the company for the purpose of authorizing the creation of, and also from creating, preference shares of the company ranking in priority to or pari passu with the existing 6000 preference shares.

The plaintiff on May 10, 1901, moved for an injunction in the terms of the second part of his claim.

*Martelli*, for the plaintiff. The memorandum of association attaches to the original preference shares a fixed cumulative preferential dividend of 7*l.* per cent., but the contention of the defendants is that under the last sentence of clause 5 there is power to "water down" the existing preference shares by the creation of further preference shares ranking pari passu with them. The plaintiff contends that the proposed increase of preference capital is illegal. In the first place, on the construction of clause 5, the memorandum does not purport to give power to alter the rights which have already been given to the preference shareholders. Secondly, a provision purporting to authorize their rights, if it is to be found in the memorandum, is invalid.

The articles of association do not help the defendants, for they are in the form which is only applicable where the preference is given by the memorandum. Where the preference is given only by the articles, the rights conferred may be altered, because s. 50 of the Companies Act, 1862, enables a company to alter its articles by special resolution: *Andrews* v. *Gas Meter Co.* (1) But as the preferential right is given by the

(1) [1897] 1 Ch. 361, 371.

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memorandum of association, although it is not one of the matters which s. 8 of the Act requires to be stated in the memorandum, it cannot be altered: *Ashbury* v. *Watson* (1); Companies Act, 1862, s. 12.

The object of giving the preferential right by the memorandum is to make it unalterable.

*Kirby*, for the defendants. The directors are only about to act on the words of the memorandum of association. That gives the holders of the preference shares a certain right as against the holders of the ordinary shares, and that is not going to be altered. But clause 5 of the memorandum expressly gives the right to issue new capital on such special conditions as to priority as the company may from time to time determine. The ordinary shares are also mentioned in the memorandum, but it could not be argued that new shares having priority over the ordinary shares could not be issued. Why, then, cannot new shares be issued with priority over or ranking pari passu with the original preference shares? The directors are not seeking to alter the memorandum, but to act under it. *Andrews* v. *Gas Meter Co.* (2) is in my favour. [He also referred to *Collins* v. *Birmingham Breweries*. (3)]

*Martelli*, in reply. The directors are acting in contravention of s. 12 of the Act of 1862 by altering one of the conditions of the memorandum. That section points out when and how a memorandum of association can be altered, and its operation cannot be evaded by inserting in the memorandum itself a power to alter any of its provisions. [He referred to Palmer's Company Precedents, 7th ed. Pt. I. p. 367.]

*Cur. adv. vult.*

May 17. COZENS-HARDY J. This motion, which by arrangement is to be treated as the trial of the action, raises a question whether the defendant company can issue preference shares. This turns upon the construction of a badly drawn and obscure clause in the memorandum of association. [His Lordship read clause 5 of it, and continued:—]

(1) (1885) 30 Ch. D. 376. (2) [1897] 1 Ch. 361, 371.
(3) (1899) 15 Times L. R. 180.

The whole of the original capital, both preference and ordinary, has been issued. The company desire to increase their capital by the issue of shares having a preference pari passu with the original 7*l.* per cent. preference shares. I think it is competent for the company to do this. The memorandum of association cannot be altered by the company, but the memorandum itself, after defining the position of the original shareholders, states that any increased capital may be issued on such special conditions as to priority as the company may determine. The result is that the 7*l.* per cent. preference shareholders, while having an absolute right as against the original shareholders, are subjected, by the memorandum itself, to the risk of having increased capital placed in front of or alongside them. The clause is ill-drawn, because it is difficult to see how it can apply to the present or original capital, but I do not think it is so obscure that I ought to decline to give effect to it. I must, therefore, dismiss the action.

Solicitors for plaintiff: *Morten, Cutler & Co.*
Solicitors for defendants: *Nicholson, Graham & Graham.*

F. E.

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*May* 15, 17, 23.

## HARROLD *v.* PLENTY.

[1900 H. 1562.]

*Company—Shares — Equitable Mortgage — Pledge — Deposit of Certificate— Foreclosure.*

Where a certificate of shares is deposited as security for a debt and interest without a transfer or memorandum, the remedy of the lender against the shares is an order for transfer and foreclosure.

Undefended Motion for judgment.

The plaintiff sued in respect of an advance of 150*l.* made to the defendant and interest, to secure which a certificate of shares was deposited with the plaintiff. The plaintiff claimed an order for transfer of the shares to himself by foreclosure, or in the alternative sale. The defendant made default in appearance, and a statement of claim was delivered by filing. The action was brought on by way of motion for judgment on the statement of claim taken as admitted. The material allegations were: "In or about the month of March, 1897, the defendant deposited with Frederick Joseph Jesser Harrold, late of Kin Kiang, Newbury, in the county of Berks, the certificate for ten ordinary shares of 10*l.* each, and numbered 987 to 996 inclusive, in Plenty & Son, Limited, a company registered under the Companies Acts, 1862 to 1890, and having its registered office situate at the Eagle Iron Works, Newbury, aforesaid, as security for the repayment to the said Frederick Joseph Jesser Harrold of the sum of 150*l.*, and then owing to him from the defendant, with interest thereon at the rate of 6*l.* per cent. per annum."

*Dighton Pollock*, for the plaintiff. The plaintiff desires to have foreclosure, and not sale. I submit that the deposit of the certificate as security is evidence of an agreement to execute a transfer by way of mortgage—in other words, an equitable mortgage. The remedy of an equitable mortgagee is to have an order to get the legal interest vested in him and foreclosure. The transaction is not a pledge. Shares are not the subject-

matter of a pledge: Robbins on Mortgages, 280, 1465; *Ryall* v. *Rowles* (1); *Sewell* v. *Burdick*. (2) In *Sadler* v. *Worley* (3) it was held that the remedy of a debenture-holder was foreclosure. In *London and Midland Bank* v. *Mitchell* (4), where there was a deposit of certificates with a transfer in blank as to date and name of transferee to secure a debt, it was held that, after the remedy by action for debt was barred by time, the creditor could foreclose. In *Ex parte Stewart* (5) a similar transaction was treated as an equitable mortgage. *Ex parte Moss* (6) tends to shew that the fact of there being no transfer or memorandum makes no difference.

On the other hand, in *Carter* v. *Wake* (7) a deposit of bonds (to bearer) was treated as a pledge. In *Gorgier* v. *Mieville* (8) a pledge of the bond of a foreign prince, expressed to be payable to bearer, was held good. In *In re Owen* (9) it was held that the remedy of a person who had, under a will, a charge on a reversionary interest in land was sale. In *Halliday* v. *Holgate* (10), *Donald* v. *Suckling* (11), *Colonial Bank* v. *Cady* (12), and *Ex parte Sargent* (13), the word pledge was used as applicable to a security by deposit of certificates of shares; but in none of those cases did the decision turn on the difference between a pledge and an equitable mortgage. In *France* v. *Clark* (14) Fry J. treating a deposit of a share certificate with a transfer in blank as to date and name of transferee as a pledge, held that a purchaser from the holder of the certificate took with notice of equities. The Court of Appeal (15) held the same result followed if the transaction was an equitable mortgage.

May 23. COZENS-HARDY J. This action raises a question whether a person with whom a certificate of shares in a limited company has been deposited by way of security is entitled to

(1) (1749) 1 Ves. Sen. 348.
(2) (1884) 10 App. Cas. 74.
(3) [1894] 2 Ch. 170.
(4) [1899] 2 Ch. 161.
(5) (1864) 4 D. J. & S. 543.
(6) (1849) 3 De G. & Sm. 599.
(7) (1877) 4 Ch. D. 605.
(8) (1824) 3 B. & C. 45; 27 R. R. 290.
(9) [1894] 3 Ch. 220.
(10) (1868) L. R. 3 Ex. 299.
(11) (1866) L. R. 1 Q. B. 585.
(12) (1890) 15 App. Cas. 267.
(13) (1874) L. R. 17 Eq. 273.
(14) (1883) 22 Ch. D. 830.
(15) (1884) 26 Ch. D. 257.

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foreclosure, or whether his only remedy is sale. The defendant does not appear, and Mr. Pollock has put before me all the authorities which might help the defendant in resisting foreclosure. The only material allegation in the statement of claim is that in March, 1897, the defendant deposited with Harrold the certificate of ten ordinary shares in a limited company as security for the repayment to Harrold of the sum of 150*l.*, then owing to him from the defendant, with interest thereon at the rate of 6*l.* per cent. per annum. Now, it is plain that a pledgee is in a very different position from an ordinary mortgagee. He has only a special property in the thing pledged. He may obtain a sale, but he cannot obtain a foreclosure. I do not think that this is properly a case of pledge. A share is a chose in action. The certificate is merely evidence of title, and whatever may be the result of the deposit of a bearer bond, such as that which Sir George Jessel dealt with in *Carter* v. *Wake* (1), I think I cannot treat the plaintiff as a mere pledgee. The deposit of the certificate by way of security for the debt, which is admitted, seems to me to amount to an equitable mortgage, or, in other words, to an agreement to execute a transfer of the shares by way of mortgage. The result is that the plaintiff is entitled to a judgment substantially in the form which would be given if, instead of the certificate of shares, the document had been a title-deed of real estate or a policy of assurance: See Seton on Judgments, 5th ed. p. 1701.

Solicitors for plaintiff: *Maude & Tunnicliffe, for S. J. Knight, Newbury.*

(1) 4 Ch. D. 605.

D. P.

FARWELL J.
1901
May 21.

## *In re* SANDBACH SCHOOL AND ALMSHOUSE FOUNDATION. ATTORNEY-GENERAL *v.* EARL OF CREWE.

[1899 S. 1441.]

*Parish—Division of Parish—Parochial Chapelry or separate Parish.*

A chapelry may form part of a parish although the inhabitants of the chapelry have never been assessed for church-rates or repairs, or taken any part in the election of churchwardens of the parish church, and although owing to the magnitude of the parish the chapelry has always appointed separate overseers and levied separate poor-rates under the Poor Relief Act, 1662.

The fact that the vicar of the parish receives the vicarial tithe of the chapelry and that residents in the chapelry are in the habit of being married at the parish church is almost conclusive evidence that the chapelry is part of the parish.

ORIGINATING SUMMONS.

This was a summons to determine what persons were eligible under the provisions of a scheme of November 28, 1887, regulating the above-mentioned charity as satisfying the description "deserving poor of the parish of Sandbach," or the description of "inhabitants and parishioners of the parish of Sandbach," as objects of the trusts of that part of the endowment applicable to non-educational purposes, and in particular whether the inhabitants of the outlying hamlets or townships of Blackden, Cotton, Church Hulme, Cranage, Goostrey, Lees, and Twemlow, or any of them, were so entitled.

The parish of Sandbach, Cheshire, originally comprised two groups of hamlets or townships, namely, the six hamlets or townships of Sandbach, Arclid, Betchton, Bradwell, Hassall, and Wheelock, hereinafter called the home townships, and the seven hamlets or townships of Blackden, Cotton, Church Hulme, Cranage, Goostrey, Lees, and Twemlow, hereinafter called the out-townships, separated from the home townships by the intervening parishes of Middlewick and Brereton. At an early period, and probably prior to the foundation of the

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charity, the townships of Church Hulme and Goostrey became separate chapelries, the chapelry of Church Hulme comprising the townships of Cranage, Cotton, and Church Hulme, and the chapelry of Goostrey comprising the townships of Lees, Twemlow, Blackden, and Goostrey.

The charities of the parish consisted of non-educational and educational charities.

The non-educational charities were established about 1680, and, with the exception of certain fixed annual payments to the chapelwardens of the chapelries of Church Hulme and Goostrey for the poor of those chapelries, their benefits were originally confined to the home townships.

The educational charity, which consisted of an endowed school founded in 1718 for twenty poor children inhabiting within the parish of Sandbach, extended to all the townships.

In 1848, at which time the charity income had increased, a private Act (11 & 12 Vict. c. 11) was passed by which all the property was vested in one set of trustees, discharged from the existing trusts, and upon the trusts thereinafter expressed, being trusts (inter alia) to make certain fixed annual payments out of income to the chapelwardens of the chapelries of Church Hulme and Goostrey to be distributed among the poor of those chapelries, to lay out and apply 200*l.* per annum out of income amongst "the deserving poor of the parish" not receiving parochial relief in clothes, provisions, or coal, to make certain annual payments out of income for educational purposes, to pay 200*l.* a year out of income for the maintenance of the almspeople thereafter mentioned, to establish a new school in the town of Sandbach for the education of boys over seven years old being children of the inhabitants of the parish of Sandbach generally, to erect twenty almshouses in the parish of Sandbach for the reception of twenty poor persons who had been "inhabitants and parishioners of the said parish" and had certain other qualifications, the allowances to be 10*l.* each per annum paid monthly, and to apply the residue of the income in aid or extension of any of the charitable purposes.

The scheme of November 28, 1887, made under the Endowed Schools Acts, while varying the details of the above trusts, made

no change as to the qualification of persons eligible for the benefits of the non-educational charities. The trustees were thenceforth to be called the governors. The residue of income was to be applied to educational purposes.

The governors of the charity taking the view that the chapelries of Church Hulme and Goostrey were separate parishes and not part of the parish of Sandbach, had always confined the benefit of the non-educational charities (with the exception of the fixed payments) to residents within the home townships. The inhabitants of the out-townships having claimed to participate therein, this summons was issued to determine the point.

The facts relied on by the governors were as follows:—

Since 1744 each of the thirteen townships had always formed a distinct unit for civil purposes, and had appointed separate overseers for the poor, guardians, and surveyors of highways or waywardens, and levied a separate poor-rate and highway rate. At the present time each township had its own parish council or parish meeting. The wardens and sidesmen for the parish of Sandbach had been chosen from and by the residents in the home townships only, and assessments for church-rates for the parish of Sandbach had been made in the home townships only. When Sandbach church, which stands in the township of Sandbach, was rebuilt in 1847 and 1848, the home townships alone were assessed and rated to provide the funds. The endowment of Goostrey consisted of glebe, and the endowment of Church Hulme of glebe and rectorial tithe issuing from lands in the townships of Church Hulme and Cranage. No rectorial tithe had ever been paid to the vicar of Sandbach.

The facts relied on by the Crown were as follows:—

From early in the eighteenth century, as was shewn by documents filed in the public episcopal registry at Chester, such as accounts of the endowments, replies to articles of inquiry exhibited by the Bishop of Chester, nominations of incumbents, and the Bishop's Act Books, the chapelries of Church Hulme and Goostrey were parochial chapelries within the parish of Sandbach, and the incumbents were nominated by the vicar of Sandbach, and licensed to the chapel or to the

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perpetual curacy of Church Hulme and Goostrey respectively, and had never been presented, instituted, or inducted—a fact which shewed that the incumbencies were chapelries and not parishes with independent cure of souls. The whole of the vicarial tithe upon the lands in all thirteen townships was payable to the vicar of Sandbach. Residents in the chapelries of Goostrey and Church Hulme were frequently married or buried at Sandbach parish church.

*Sir R. Finlay, A.-G., Dibdin, K.C.*, and *Beaumont*, for the Crown. The Act of 1848 clearly directs the non-educational charities to be applied for the benefit of the parish of Sandbach, i.e., the parish generally, and the only question is what that parish includes. The chapelries of Church Hulme and Goostrey having been part of the parish of Sandbach cannot have become separate parishes without an Act of Parliament in that behalf. The fact that the incumbents are nominated and not presented by the vicar of Sandbach, that residents in the chapelries can be married or buried in Sandbach church, and that the vicar receives the vicarial tithe, conclusively shews that Church Hulme and Goostrey are merely chapelries of the parish and not separate parishes. They are so described both in Ecton's Thesaurus (1st ed. 1742), p. 730; (3rd ed. 1763) p. 575, and also in the Index to the Orders in Council and other matters published in the *London Gazette* from 1830 to 1883.

*Jenkins, K.C.*, and *Austen-Cartmell*, for the governors. The Act was not intended to enlarge the area of the non-educational charities, but to execute them cy-près. Assuming, however, that these charities are directed to be applied for the parish of Sandbach, that parish does not include the chapelries of Church Hulme and Goostrey—at all events, for civil purposes, whatever it may do in the strict ecclesiastical sense.

A parish for ecclesiastical purposes is that circuit of ground which is committed to the charge of one parson or vicar, or other minister having cure of souls therein: Steer's Parish Law, 6th ed. p. 3; but since the Poor Relief Act, 1601 (43 Eliz. c. 2), a district that has distinct overseers, makes distinct rates, and

maintains its poor separately, is a separate parish for charity purposes: *Attorney-General* v. *Grant.* (1)

This distinction is recognised by the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 5, which provides that in every Act passed after 1866 "parish" shall mean "a place for which a separate poor-rate is or can be made, or for which a separate overseer is or can be appointed."

There are three possible meanings to parish, namely, the ecclesiastical area for which the Crown contends, the rateable area limited to Sandbach township, for which neither side contends, and the church-rates area, for which the governors contend. A church-rates district is treated as a quasi-parish by the Compulsory Church Rate Abolition Act, 1868 (31 & 32 Vict. c. 109), s. 6. The ecclesiastical area is excluded by the separate rating, and the fact that churchwardens were elected, and church-rates and expenses for repairs paid by members of the home townships only, shews that the parish is confined to those townships.

*Dibdin, K.C.*, in reply. In 1848 there was no distinction between an ecclesiastical parish and a civil parish.

It is true that after the Poor Relief Act, 1601, the existence of separate overseers was rightly regarded as a test of a separate parish, but after 1662 that test cannot be applied to the large sub-divided parishes to which the Poor Relief Act, 1662 (14 Car. 2, c. 12), s. 21, applies. That section was expressly passed to remedy the inconvenience of having one set of overseers for such large parishes. After reciting that the inhabitants of the counties of (inter alia) Cheshire and many other counties in England and Wales, by reason of the largeness of the parishes within the same, cannot reap the benefit of the Poor Relief Act, 1601, it enacts that poor persons within every township or village within the several counties aforesaid shall be provided for within the several and respective township and village wherein they inhabit, or were last lawfully settled; and that there shall be yearly chosen and appointed, according to the rules and directions in the Poor Relief Act, 1601, two or more overseers of the poor within every of the said townships

(1) (1720) 1 P. Wms. 669.

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or villages, who shall do, perform, and execute all and every the acts, powers, and authorities for the necessary relief of the poor within the said township or village.

The section in effect provides machinery for collecting the rates of the mother parish, when too unwieldy to be collected by one set of overseers, and the separate-overseers test cannot therefore be applied after 1662: *Reg.* v. *Watson.* (1)

The fact that the vicar of Sandbach receives the vicarial tithe of all the townships shews almost conclusively that they form one parish: *Reg.* v. *Clayton.* (2) The fact that the out-townships were not assessed for church-rates or repairs, and took no part in the election of churchwardens of the mother church, does not shew they were outside the parish of Sandbach, as it is a frequent custom for each part of a parish to support its own church or chapel exclusively: *Craven* v. *Sanderson* (3); and to elect its own churchwardens: *Rex* v. *Marsh* (4); *Bremner* v. *Hull* (5); *Green* v. *Reg.* (6)

FARWELL J., after holding that the private Act of 1848 had completely reconstituted the charities and not merely varied them cy-près, continued:—The question, therefore, turns on the meaning of the word "parish" as used in the Act. The argument presented has been this. It has been said that "parish" here may mean one of three things. It may mean either the ecclesiastical parish, or the area which is separately rated, or so much of the ecclesiastical parish as on the evidence has contributed towards church-rates in the past while there were church-rates, and to repairs of the old parish church. In my opinion, the Poor Relief Act, 1662, and the cases referred to by the Crown, shew conclusively that the first and the larger sense is the only possible one; the ecclesiastical parish is, properly speaking, the whole parish and parish proper.

Now, what are the tests which I can use to ascertain whether that is the meaning in the private Act or not? In the first

(1) (1868) L. R. 3 Q. B. 762.
(2) (1849) 13 Q. B. 354, 362.
(3) (1838) 7 Ad. & E. 880.
(4) (1836) 5 Ad. & E. 468; 44 R. R. 473.
(5) (1866) L. R. 1 C. P. 748.
(6) (1876) 1 App. Cas. 513.

place, I can find no words in the Act itself which point to a limitation of the generality of the word "parish" in either of the ways pointed out by the governors: nothing on the face of the Act suggests it.

The first point relied upon by the governors is that these townships have each paid poor-rates to their own overseers, and have not paid rates to the overseers of the parish of Sandbach generally. That is conclusively answered by a reference to the Poor Relief Act, 1662, which shews that it was the only possible way in which the rates could have been paid under the circumstances. Having regard to the magnitude of the parish and to the Poor Relief Act, 1662, separate overseers had to be appointed for each of the various townships, and no argument at all can be founded on the existence of those separate overseers.

Then on behalf of the Crown there is the point that the whole vicarial tithe is received by the vicar of the parish. That was considered to be a matter of very great importance in the case of *Reg.* v. *Clayton* (1), and to my mind is almost conclusive; and when I couple that with the fact that persons living in the two chapelries have been in the habit of being married in the parish church, it appears to me that having regard to the marriage laws, that also is in favour of the contention of the Crown as to the meaning of the word "parish" as applied to Sandbach. Against that it is said that the church-rates and repairs of the church have been borne by the inhabitants of the home townships only. That is answered by *Craven* v. *Sanderson* (2), which shews that an arrangement under which the inhabitants of a parish church district and the inhabitants of a chapelry district contribute each exclusively to the repairs of the place of worship within their own district is a legal and a possible one; and if that be so, no argument can be founded on a fact attributable to such an arrangement.

Then there are the Orders in Council which throughout treat the two chapelries in question as within the parish of Sandbach.

(1) 13 Q. B. 354, 362. (2) 7 Ad. & E. 880.

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SANDBACH SCHOOL AND ALMSHOUSE FOUNDATION, *In re.*
ATTORNEY-GENERAL *v.* CREWE (EARL OF).

In my opinion, it is proved conclusively that the parish of Sandbach does include these two chapelries, and I can find on the private Act nothing whatever to shew that the word "parish" means anything less than the whole parish of Sandbach; and I answer the question accordingly.

Solicitors: *Treasury Solicitor; Pritchard, Englefield & Co., for Robert Bygott & Sons, Sandbach.*

G. R. A.

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FARWELL J.
1901
*June* 6, 12.

## GREENHALGH *v.* BRINDLEY.

[1901 G. 87.]

*Vendor and Purchaser—Contract—Enjoyment of Light—Deed of Acknowledgment—Non-disclosure—Specific Performance—Compensation—Costs.*

A contract for the sale of a house with windows looking over the land of a third person implies no representation or warranty that the windows are entitled to the access of light over that land, or even that the prescriptive period is running, and consequently the non-disclosure of a deed acknowledging that the vendor is not entitled to that light is no ground for refusing the vendor specific performance, or allowing the purchaser compensation, though it may be a ground for depriving the vendor of his costs.

There is no such thing known to the law as an inchoate easement. *Bonner* v. *Great Western Ry. Co.*, (1883) 24 Ch. D. 1, followed.

WITNESS ACTION.

This was a vendor's action for specific performance.

By a contract in writing dated October 4, 1900, the vendor agreed to sell and the purchaser to buy twelve houses in Florence Street, Stockport, for the sum of 1400*l.* The purchaser had previously inspected the property, to which the vendor was entitled in fee simple.

The front windows of the houses, which to the knowledge of both parties were only built in 1896, looked south across Florence Street, which was about eighteen feet wide, over a recreation ground belonging to the Stockport Corporation, who were bound by restrictive covenants to use the land (except with the consent in writing of their grantors, Lord Egerton of

Tatton and his trustees) for no other purpose than a public recreation ground, and not to erect thereon any buildings or erections except such as should be approved of in writing by those grantors as necessary or proper for the convenience of using the land for a public recreation ground. The Florence Street side of the recreation ground was at present bounded by a dwarf wall and railings.

Nothing was said during the negotiations or in the contract as to the access of light to the windows; but on investigating the title the purchaser ascertained that the vendor had entered into a deed of acknowledgment with the corporation in respect thereto.

By this deed, which was dated February 10, 1900, and made between the corporation of the first part, William Walmsley, the mortgagee of the houses, of the second part, and the vendor (thereinafter called "the owner," which term was expressed to include the owner for the time being of the houses) of the third part, the owner covenanted with the corporation that the owner would pay the corporation the yearly sum of one shilling on March 25 in each year, and the owner and the mortgagee declared each of such payments to be a fresh acknowledgment that the owner had not been nor was he entitled as of right to the uninterrupted flow of light to any windows or lights in the southerly walls of the said houses over or from the recreation ground, and it was declared that in case of the non-payment of the said sum of one shilling in any year or in any number of years, the fact of any such non-payment or non-payments for any year or any number of years should not be taken as an abandonment of the rights of the corporation to obstruct on their own land the admission of light to the said lights or windows, but the deed should remain in full force notwithstanding such non-payment.

The purchaser having refused to complete unless compensation was allowed in respect of this deed, the vendor issued a writ for specific performance.

*Upjohn, K.C.*, and *T. T. Methold*, for the vendor. The deed of acknowledgment does not bind the land, and the purchaser,

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who is not bound to pay the shilling a year, can determine the arrangement by notice at any moment.

The contract is a contract to sell the houses, not an easement, still less an inchoate easement, which is a right unknown to the law: *Bonner* v. *Great Western Ry. Co.* (1)

*Jenkins*, *K.C.*, and *Hon. Frank Russell*, for the purchaser. The deed of acknowledgment being a restriction on one of the natural incidents of the ownership of houses, namely, the potentiality of prescribing for light, ought to have been disclosed before the contract. It is clearly an agreement within s. 3 of the Prescription Act, 1832, and it binds a purchaser with notice: *Bewley* v. *Atkinson*. (2) The declaration that non-payment of the shilling is not to be taken as an abandonment of the corporation's right to obstruct the light prevents the agreement being determined by non-payment as suggested in *Bewley* v. *Atkinson* (2), and there is no other way of determining it.

The purchaser therefore, though not bound to pay the shilling a year, can never acquire an easement.

If the purchaser gives notice to determine the agreement, the corporation will do one of two things. They will either treat the notice as valid, and at once obtain the requisite consent to raise the wall or put up a hoarding, or they will treat it as invalid and bring an action for a declaration to that effect. In the former event the purchaser is compelled to prompt the corporation to block the lights; in the latter she has bought a lawsuit, as no declaration in this action can bind the corporation. This is an unfair burden to put on the purchaser, who has in any case lost four years of the prescriptive period, which she was entitled to assume had run from the date of erection of the houses. The purchaser is at all events entitled to compensation.

*Upjohn*, *K.C.*, in reply. The right to obstruct light is an unmeaning expression: *Tapling* v. *Jones*. (3)

The deed of acknowledgment conferred no right on the corporation, but merely prevented them losing their natural right to build on their own land.

(1) 24 Ch. D. 1. (2) (1879) 13 Ch. D. 283. (3) (1865) 11 H. L. C. 290.

It was in no sense a restriction or incumbrance on the vendor's property, and it was therefore unnecessary to disclose it before the contract.

The statutory covenant for title would be limited to "the subject-matter expressed to be conveyed"—Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 7—in this case the fee simple of the houses. This is unaffected by the deed of acknowledgment. The purchaser is not entitled to compensation, even if it were possible to assess it.

*Cur. adv. vult.*

June 12. FARWELL J., after stating the facts and reading the deed of acknowledgment, continued:—No purchaser would be bound by the covenant to pay contained in this deed; but as against a purchaser with notice the deed would have the effect of a consent in writing within s. 3 of the Prescription Act granted by the corporation and accepted by the purchaser, and continuing until determined by notice of repudiation. In this respect the arrangement bears some resemblance to that which formed the subject of the decision in *Bewley* v. *Atkinson*. (1) Notwithstanding the purchaser's argument, I have no doubt that she can put an end to the arrangement created by the deed. The very nature of the transaction shews this, for the object is to prevent time from running under the Prescription Act against the corporation, and notice of repudiation gives them twenty years in which to assert their rights by blocking the windows. Further, on the construction of the deed, the person to make the payments is the owner for the time being; but the covenant cannot bind the purchaser to make any such payment, and the proviso that follows although binding her merely negatives the presumption of abandonment of right by omission to receive, and does not extend to the presumption or inference arising from a positive refusal to pay and acquiescence in that refusal. The effect of the deed, therefore, as against the purchaser is merely to postpone the commencement of the statutory period until she has given notice of repudiation; and this she can do as soon as she has completed her purchase. It is argued that

(1) 13 Ch. D. 283.

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the purchaser is prejudiced by this in two ways: (1.) By losing four years of the statutory period; and (2.) by being compelled to give notice of repudiation, with the consequent probability of prompting the corporation to block the lights at once. But a contract for the sale of a house with windows looking over the land of a third person implies no representation or warranty that the windows are entitled to the access of light over that land. If the access has in fact been enjoyed for the statutory period, then the property has the easement of light; but an access for ten years creates nothing at all: *Bonner* v. *Great Western Ry. Co.* (1); and the so-called potentiality of the acquisition of the easement within less than twenty years is not an interest in land or easement known to the law. It is a mere question of the doctrine of chances; and, assuming the owner of the adjoining land to be alive to his own interest, the chances are far greater that he will block the lights in the second than in the first half of the period. There is no such period of twenty years to the lapsed portion of which the purchaser is entitled, as her argument assumes. There is either an easement of light or there is not. If there is not, there is no intermediate stage which has any legal existence; and the vendor does not fail to possess the fee simple free from incumbrances of a house because he has not got the easement of light over the adjoining property, nor because the time necessary for acquiring that easement has not commenced to run. I find, therefore, no ground on which I can refuse to grant specific performance, or on which I can give the purchaser compensation. Compensation is given in respect of the difference between the expressed subject-matter of the contract and the property offered by the vendor as answering that description, and in this case there is none. But although I must make the usual decree for specific performance, I make no order as to costs, for this reason;—a vendor knows and a purchaser does not know the circumstances of the property before the contract; in this case the vendor has chosen to enter into a contract with the corporation which renders his position different from the normal position of the vendor of a house, and he appeals to

(1) 24 Ch. D. 1.

this Court for the equitable remedy of specific performance. I think he ought in fairness to have informed the purchaser before the contract of his covenant with the corporation, and left her to judge for herself whether it was or was not advantageous to the property; and in refusing to make her pay costs I am only following the example of Romer J. in *In re Summerson* (1), which I have already followed in *Hepworth* v. *Pickles*. (2)

Solicitors: *Rowcliffes, Rawle & Co., for Russell, Coppock & Helm, Stockport; Robinson & Bradley, for Joseph Grundey, Stockport.*

G. R. A.

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## W. H. CHAPLIN & CO., LIMITED *v.* MAYOR OF THE CITY OF WESTMINSTER.

[1900 W. 4478.]

*Highway—Local Authority—Obstruction on Highway—Lamp-post—Interference with Trade—Adjoining Owner—Public or Private Nuisance—Individual Interest in Public Right—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 130.

An owner of premises abutting on a highway enjoys as a private right the right of access from his own premises to the highway, and any interference with that access is an interference with a private right. But his right to transfer goods from vans in the public roadway across the public pavement to his premises is a right enjoyed by him as one of the public entitled to use the highway. It is an individual interest in a public right, but is not a private right which entitles him to restrain a local authority, acting bonâ fide under statutory powers, from obstructing the highway adjoining his premises in a manner which affects his personal convenience.

WITNESS ACTION.

This was an action for an injunction to restrain the defendants from erecting any structure or post on the west side of Villiers Street, Strand, in such a position as to cause obstruction to the plaintiffs as occupiers of adjoining premises.

The action was originally commenced against the vestry of St. Martin-in-the-Fields and the Charing Cross and Strand

(1) [1900] 1 Ch. 112, n. (2) [1900] 1 Ch. 108.

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Electricity Supply Corporation, Limited (the contractors to the vestry); but when, on November 8, 1900, the vestry were replaced by the corporation of the city of Westminster, the plaintiffs by leave added as defendants the mayor, aldermen, and councillors of the city of Westminster, and the action was dismissed as against the original defendants.

In 1899 the defendants or their predecessors determined to light Villiers Street by electricity, and for that purpose to erect standards or lamp-posts to support the lights. Villiers Street ran on a considerable slope north and south on the east side of Charing Cross Station, and there was a passage or footway called Craven Passage which ran at right angles from it, under the station, into Craven Street. Messrs. W. H. Chaplin & Co. were lessees of extensive cellars alongside of Villiers Street under and on both sides of Craven Passage, and their offices were the corner house of Villiers Street and Craven Passage at the south side of the latter. The frontage of their premises to Villiers Street was 37 ft. 6 in., and the width of Craven Passage was 30 ft. 5 in. The defendants proposed, for the purpose of lighting Villiers Street, to erect a lamp-post on the pavement on the west side of Villiers Street near the kerb and opposite the centre of Craven Passage. Before coming to this decision the defendants considered the desirability of another site for the lamp-post; and also declined a suggestion that the lamp should be suspended from a bracket fixed to the plaintiffs' offices. This suggestion was refused on the ground that the station was about to be extended up to Villiers Street, which would make it necessary to do the work over again.

The plaintiffs alleged that the proposed lamp-post would interfere with their business of wholesale wine and spirit merchants, and in fact would be a dangerous nuisance. They were in the habit of loading on and unloading from vans standing in the roadway in Villiers Street cases of wine which were carried and heavy barrels of wine which were rolled along Craven Passage to and from their cellars, and empties which were carried to their offices. They frequently had three vans standing there: the centre one employed in loading or unloading barrels, the northern one used for cases, and the southern one

for empties. They said that this arrangement of the vans was necessitated by the character of the slope of Villiers Street, and that the lamp-post would be at the exact spot where barrels had to be unloaded. After some correspondence between the parties, a model of the lower part of the lamp-post was erected on the proposed site and remained there for about two months. The plaintiffs alleged that it proved that the lamp-post would obstruct their business, and they proceeded with their action.

*H. Terrell, K.C.*, *Hatfield Green*, and *E. J. M. Chaplin*, for the plaintiffs. The defendants are proceeding under s. 130 of the Metropolis Management Act, 1855, but that section does not authorize them to erect a lamp-post where it will be a nuisance to the owners of adjoining property; it does not empower them to interfere with private rights: *Vernon* v. *Vestry of St. James, Westminster*. (1)

[Buckley J. referred to *Baird* v. *Tunbridge Wells Corporation*. (2)]

As owners of the adjoining premises the plaintiffs are owners of the land on which it is proposed to put up this lamp-post, and have a private right of access to their premises for trade purposes which the defendants have no right to injure.

*Astbury, K.C.*, and *A. àB. Terrell*, for the defendants. The defendants are a public body on whom the statutory duty is imposed of lighting this highway. In the exercise of their discretion they have come to the conclusion that this is the best position for the lamp-post, and they are entitled to place it there whatever inconvenience it may cause to the plaintiffs: *Goldberg & Son, Limited* v. *Liverpool Corporation*. (3) On the facts it is clear that very little injury, if any, will be done to the plaintiffs.

*H. Terrell, K.C.*, in reply. In *Goldberg & Son, Limited* v. *Liverpool Corporation* (3), the corporation had power under their Act to make a tramway and to do the very work complained of.

[Buckley J. They only had a general power to construct

(1) (1880) 16 Ch. D. 449, 469. (2) [1894] 2 Q. B. 867.
(3) (1900) 82 L. T. 362.

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a tramway and to do everything necessary for that purpose. There was no special power to put poles on the pavement.]

Railways are on a different footing: *Hammersmith and City Ry. Co.* v. *Brand* (1); *London, Brighton and South Coast Ry. Co.* v. *Truman.* (2) If an Act of Parliament authorizes a corporation or other undertakers to do a particular work, specifying a work such as the construction of a railway in a particular place, then, if that work creates a public or a private nuisance, no action will lie against the undertakers, either by the Attorney-General or by a private individual, in respect of the nuisance. If the Act authorizes the undertakers to do works which must of necessity cause a public and a private nuisance, no action will lie. But if the Legislature directs works to be done which must cause a public nuisance but will not necessarily cause a private injury, then an action for the private nuisance will lie. Here the defendants have to erect lamp-posts, and in that way have power to obstruct the highway; but they have no express power to cause a public nuisance, and no power express or implied to cause a private nuisance to the plaintiffs: *Vernon* v. *Vestry of St. James, Westminster.* (3) This is an injury to a private right, and that is the reason why the plaintiffs can sue without adding the Attorney-General.

[BUCKLEY J. The plaintiffs seek to enforce an individual right, because they will be more injured than other members of the public; but their right is but part of the right of the public to use this highway. They are entitled to sue without the Attorney-General because they have this individual interest in a public right, not because they have a private right.]

An injury to an individual interest in a public right is ground for an action. This, however, is the private right of the adjoining owners to use their own land subject to the right of highway, and that right can only be taken away by express enactment: *Metropolitan Asylum District* v. *Hill.* (4) The defendants are not entitled to interfere with the right of access

(1) (1869) L. R. 4 H. L. 171.
(2) (1885) 11 App. Cas. 45.
(3) 16 Ch. D. 449, 469.
(4) (1881) 6 App. Cas. 193, 201, 208.

to our premises: *Fritz* v. *Hobson* (1); *Lyon* v. *Fishmongers' Co.* (2); *Attorney-General* v. *Thames Conservators* (3); *Rose* v. *Groves.* (4)

BUCKLEY J. referred to the facts and to the suggestion that the lamp should be suspended on a bracket, and continued:—It does not lie within my province to ascertain whether the defendants might, or might not, reasonably have accepted that suggestion. I can quite understand that a public body may have considerable difficulty in agreeing to suspend lamps from the premises of adjoining frontagers. The defendants say that the position of this standard lamp is the most convenient, in fact, the only convenient, position for it, and unless I can review, which I think I cannot, their discretion in that respect, I cannot inquire whether the suggestion the plaintiffs made was reasonable or not. It is for the defendants to determine where the posts, or brackets, or whatever they are, are to be placed. The only thing for me to determine is whether the plaintiffs have a legal right to restrain the defendants from doing that which the defendants, in their discretion, say is the proper way of dealing with this matter.

[His Lordship described the way in which the plaintiffs carried on their business and the process of loading and unloading the vans, and continued:—]

The plaintiffs set up a right to have a particular portion of the highway so kept as that they shall be in a position to exercise an alleged right of using it to the maximum of their own convenience. It does not seem to me that they have any such right. What is their right? It has been put forward that they have some private right. It seems to me that that is wrong. The right which they here seek to exercise is a right which they enjoy in common with all other members of the public to use this highway. They have an individual interest which enables them to sue without joining the Attorney-General, in that they are persons who by reason of the neighbourhood of their own premises use this portion

(1) (1880) 14 Ch. D. 542.
(2) (1876) 1 App. Cas. 662.
(3) (1862) 1 H. & M. 1, 31.
(4) (1843) 5 Man. & G. 613, 620.

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of the highway more than others. They have a special and individual interest in the public right to this portion of the highway, and they are entitled to sue without joining the Attorney-General because they sue in respect of that individual interest; but the right which they seek to exercise is not a private right, but a public right. A person who owns premises abutting on a highway enjoys as a private right the right of stepping from his own premises on to the highway, and if any obstruction be placed in his doorway, or gateway, or, if it be a river, at the edge of his wharf, so as to prevent him from obtaining access from his own premises to the highway, that obstruction would be an interference with a private right. But immediately that he has stepped on to the highway, and is using the highway, what he is using is not a private right, but a public right.

Now, for that I will only refer to three cases to shew that that is the law. In *Attorney-General* v. *Thames Conservators* (1) Page Wood V.-C. says this (2): "Independently of the authorities, it appears to me quite clear, that the right of a man to step from his own land on to a highway is something quite different from the public right of using the highway. The public have no right to step on to the land of a private proprietor adjoining the road. And though it is easy to suggest metaphysical difficulties when an attempt is made to define the private as distinguished from the public right, or to explain how the one could be infringed without at the same time interfering with the other, this does not alter the character of the right." Then a little further on, the particular case with which the Vice-Chancellor had to deal being one of access to a wharf, he said this: "But, in truth, the access is not blocked up. The wharf will not be as readily and easily approached, and perhaps not at all by the same route; but that is a mere interruption to the navigation of the river which they enjoy in common with the public, and not as part of their special right of access." There you have the two things contrasted—the right of stepping from the private property on to the highway, or from the highway on to the private property,

(1) 1 H. & M. 1. (2) 1 H. & M. 32.

and the right of use of the highway in proximity to the private property. One is a private right, and the other is a public right. That passage in the judgment of Page Wood V.-C. was read and approved by Lord Cairns in the House of Lords in *Lyon* v. *Fishmongers' Co.* (1), and it was again referred to and acted upon by Fry J. in the case of *Fritz* v. *Hobson.* (2) In the head-note to *Attorney-General* v. *Thames Conservators* (3), which correctly, I think, reproduces the judgment, it is stated that it was there held, "That the right of access to a wharf was a private right within [a certain saving]; but that a pier, which rendered the approach to a wharf less convenient without rendering access impossible, was an interference, not with the private right of access, but with the public right of navigation enjoyed by the wharf-owner in common with the rest of the public." It appears to me that that authority is precisely in point upon the question which I have to consider here. The lamp-post which is set up near to the plaintiffs' premises is an obstruction to the highway adjoining these premises, but is no obstruction to their private right of stepping from the highway on to their own premises.

Now what the plaintiffs are complaining of is this. They say the erection of this standard on the pavement near to their premises will be an obstruction to the highway, and, as such, of course a common law nuisance. They are entitled to complain of that as members of the public, and they are entitled to sue in their own name in respect of it, because they are individuals specially affected by an interference with their rights. But what are their rights? Under the Metropolis Local Management Act, s. 130, a statutory duty is cast upon the defendants to cause their streets to be lighted, and the section provides that they for that purpose "shall maintain, or set up and maintain, a sufficient number of lamps in every such street." So that there is here cast upon the defendants a statutory duty to do an act, and to erect in the highway lamps (which will be obstructions) so far as necessary for the purpose of doing that act. Now, what is it they are doing?

(1) 1 App. Cas. 662, 676. (2) 14 Ch. D. 542, 554.
(3) 1 H. & M. 1.

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It is not suggested for a moment that they are not acting perfectly bonâ fide. Their bona fides is not questioned at all. What they say is this, and it commends itself to one's common sense, if one had to consider it. Directly a fixed obstruction is put up, the cardinal question is, how far is that obstruction from the next fixed obstruction? The greater or less proximity of two fixed points will, to a greater or less extent, increase the difficulty of circulation. They say this particular fixed point is at a greater distance than any other situation they can take from another fixed point. If they put it in the middle of Craven Passage at the edge of the kerb or pavement, it is at a greater distance from the plaintiffs' premises, and at a greater distance from the next adjoining premises to the north, than if placed anywhere else. That is the best place to put it. Then also this has to be considered—that if you put it rather more to the north or south, that is, not immediately opposite Craven Passage, it would not light the passage as well. The duty of lighting the passage is not cast upon the defendants, but on the railway company; but the defendants might very well regard the fact that, if they put their lamp at the side, it would cast a shadow down the passage. They are selecting a position therefore which they, in their discretion, think is the best for the convenience of the public.

Now, what is the plaintiffs' right in this respect? Their right is so to use this portion of the highway for loading or unloading their goods as to enjoy the highway reasonably in common with other members of the public entitled to its use. The highway is a thing which under the statute is to be, among other things, lighted, and lighted if necessary by fixed obstructions placed in the highway, and it appears to me that the plaintiffs' right in respect of the highway is to enjoy that reasonably with all other members of the public, and that they cannot set up an individual interest in the right to use the highway, which they enjoy in common with other members of the public, against the reasonable use by the defendants of the statutory authority given to them to obstruct the highway by lamp-posts where they think it necessary. I agree that the local authority must not so use their power as to commit a nuisance.

They ought to use it so as to benefit all the members of the public whom they have to consider reasonably according to the best of their judgment, and I think that they may, for the benefit of all, affect, to some extent, the convenience of one. Now, that is the most the plaintiffs can say that the defendants are doing. Of course, it is obvious that to place a post at this particular position will, to some extent, affect the elasticity of the plaintiffs' operations in discharging their goods; but that is all you can say that it does. [His Lordship referred to the evidence, and said that the model lamp-post had not proved to be a serious obstruction to the plaintiffs, and continued:—]

I arrive, therefore, at the conclusion of fact, if it turns on that, that the erection of the post here is in no reasonable sense an obstruction to the plaintiffs in doing that which they seek to do in the course of their business at the entrance to this passage. It seems to me, therefore, that, both on the law and on the facts, the plaintiffs fail, and, although I regret they did not come to some arrangement, as to what was really a trifling matter, without this action ever having been brought into Court, still, as I am here simply to try the legal right, and the plaintiffs fail, I must dismiss the action with costs.

Solicitors: *Dale, Newman & Hood; Fladgate & Co.*

H. C. R.

JOYCE J.
1901
*April* 19;
*May* 4.

## *In re* SCHNADHORST.
## SANDKUHL *v.* SCHNADHORST.

[1900 S. 4428.]

*Will—Construction—Gift to a Class—Gift over on Death coupled with a Contingency—"Die leaving Issue"—Divesting—Period of Defeasibility.*

A testator gave his residuary estate upon trust for his widow for life or widowhood, and after her decease or second marriage to apply the income in the maintenance and education of his children until the youngest who should be living being a son should attain twenty-one, or being a daughter attain that age or marry. Subject thereto he directed that the trust fund and the income thereof, and any accumulations not vested or applied under his will, should be held in trust for all his children who being sons should attain twenty-one, or being daughters should attain that age or marry, to whom he gave his residuary estate in equal shares. And he directed that if any of his children should die leaving issue, such issue should take his or her deceased parent's share equally as tenants in common:—

*Held*, that there was nothing in the will to limit the contingency of death leaving issue to less than the whole life of the first taker, whether son or daughter; and that the divesting clause or gift over might operate, not only during the lifetime of the testator's widow, but also after her death:

*Held*, therefore, that children who survived the testator only took vested indefeasible interests if and when they should die without leaving issue.

THE testator Francis Schnadhorst by his will, dated December 30, 1889, after giving certain legacies, devised and bequeathed the residue of his real and personal estate to his trustees upon trust for conversion and investment, and to set aside certain investments to be held upon certain trusts therein directed for the benefit of his wife, his children, and his two sisters, and upon further trust to pay the income of the residue of the trust fund to his said wife during her life if she should continue his widow, but, if she should marry again, upon trust to pay her a certain annuity during her life. The will then proceeded: "And subject to the provision aforesaid upon trust after the decease or second marriage of my wife to apply the income of the trust fund in or towards the mainte-

nance education and advancement of my children until the youngest who shall be living shall attain the age of twenty-one years or being a daughter shall attain that age or marry. Subject to the trusts and powers hereinbefore contained I direct that the trust fund and the income thereof and all accumulations of income or so much thereof as shall not have become vested or been applied pursuant to this my will shall be held in trust for all my children who being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry to whom I give and bequeath my residuary real and personal estate in equal shares. I direct that if any of my children shall die leaving issue such issue shall take his or her deceased parent's share equally as tenants in common."

The testator died on January 2, 1900, leaving him surviving his widow and three children, namely, the plaintiff Mary Frances Sandkuhl (wife of Hans Sandkuhl), the defendant Ernest Edward Schnadhorst, and Frank Gladstone Schnadhorst, all of whom were now living.

Of the testator's children F. G. Schnadhorst alone was an infant, he having been born on July 28, 1880.

The defendant E. E. Schnadhorst was married and had two infant sons, who were also defendants.

The executors and trustees appointed by the testator had renounced probate of his will, and disclaimed the trusts thereby declared. Letters of administration with the will annexed were thereupon granted to the defendant E. E. Schnadhorst.

This was a summons taken out by Hans Sandkuhl and Mary Frances Sandkuhl for the determination of the following questions: Whether upon the true construction of the will of the testator his children who had survived him and being sons had attained the age of twenty-one years, or being daughters attained that age or married, took vested indefeasible interests in the testator's residuary estate subject to the interest of the testator's widow therein; or whether they would only take such vested indefeasible interests on surviving the testator's widow; or whether they would only take such vested indefeasible interests if and when they should die without leaving issue.

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*Younger, K.C.*, and *Peterson*, for the plaintiffs. Mrs. Sandkuhl's interest was indefeasibly vested when she attained the age of twenty-one. The case is as nearly as possible on all-fours with *Home* v. *Pillans*. (1) The reasons given by Lord Brougham in that case are all applicable here. *Home* v. *Pillans* (1) was approved by Lord Cairns in *O'Mahoney* v. *Burdett*. (2) In the present case there are only two periods to which the contingency of death leaving issue can be referred, namely, (1.) before attaining twenty-one, which is covered by *Home* v. *Pillans* (1), and (2.) before the death of the tenant for life. The latter construction would suit the plaintiffs equally well. *Monteith* v. *Nicholson* (3) is also in favour of their contention.

*Dibdin, K.C.*, and *R. J. Parker*, for the infants. The word "death" in the expression "death leaving issue" means "death at any time," unless there is a context which shews that it does not. There is no such context here, and the words must receive their ordinary grammatical construction: Hawkins on Wills, 257, 258. The rule which is applicable in all these cases is given in *O'Mahoney* v. *Burdett* (2), which altered the rule established by *Home* v. *Pillans*. (1) In *Home* v. *Pillans* (1) there was no antecedent life estate, and there was a direct gift to the legatees. *Monteith* v. *Nicholson* (3) and *Ive* v. *King* (4) are both distinguishable from this case.

*W. H. Cozens-Hardy*, for E. E. Schnadhorst. Assuming that my client did not attain an indefeasibly vested interest before twenty-one, then I submit that at the latest the period at which the indefeasibility arises is the death of the tenant for life, i.e., the period of distribution: *Bolitho* v. *Hillyar*. (5) There is no case in which death with an affirmative contingency—such as here—has been treated on the same footing as death with a negative contingency, e.g., death "without leaving issue." *O'Mahoney* v. *Burdett* (2) was the case of a negative contingency.

(1) (1833) 2 My. & K. 15; 39 R. R. 116.
(2) (1874) L. R. 7 H. L. 388.
(3) (1838) 2 Keen, 719; 44 R. R. 329.
(4) (1852) 16 Beav. 46.
(5) (1865) 34 Beav. 180.

*Younger, K.C.*, in reply. *Home* v. *Pillans* (1) was not overruled in *O'Mahoney* v. *Burdett* (2), and, whatever was the decision in the latter case, I am entitled to rely upon *Home* v. *Pillans* (1), which deals with a different class of cases and stands untouched.

*Cur. adv. vult.*

May 4. JOYCE J. (after referring to the terms of the will). It was contended in the first place, upon the authority of *Home* v. *Pillans* (1), that the operation of the direction I have just read was confined to the period antecedent to the vesting—or, in other words, that the clause was not a gift over or divesting clause at all—in which case it would never apply to a daughter, but only to sons; for of course no daughter could die leaving issue unless she first married, whereupon a share would vest in her under the original gift, though perhaps not indefeasibly.

*Home* v. *Pillans* (1) was a case in which a legacy was given to each of two named individuals, both females, when and if they attained twenty-one, for their sole and separate use free from marital control, and in case of the death of either leaving children the share of the one so dying was given to her children. There was no preceding life estate, and Lord Brougham held that the legacy of each legatee became absolutely vested on her attaining twenty-one. His Lordship's reasoning has been criticised by Mr. Jarman (2 Jarm. 5th ed. 1611), and some passages in the judgment are probably at variance with the judgments of the Law Lords in *O'Mahoney* v. *Burdett*. (2) But the decision has not been overruled, and, if I may presume to say so respectfully, I think the decision was right having regard to the terms of the particular gift which was the subject of it.

In the present case the gift we have to construe is subsequent and subject to what amounts to a preceding life estate in the testator's widow. It is not to a named individual subject to a condition or contingency, but to a class, namely, the testator's children who being a son or sons attain twenty-one, or being a daughter or daughters attain that age or marry. And it is

(1) 2 My. & K. 15; 39 R. R. 116. (2) L. R. 7 H. L. 388.

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immediately followed by the direction that if any of the testator's children (not sons only) shall die leaving issue, such issue shall take their deceased parent's share.

Now, whether as a matter of construction this clause could ever operate with respect to the case of a son who died under twenty-one appears to be open to question, considering that there is no share at all given to a son who does not attain twenty-one: see judgment of North J. in *In re Hannam* (1), and the proposition in *Ive* v. *King* (2) as stated by Wood V.-C. during the argument in *In re Porter's Trust.* (3) In my opinion also the reasons given by Lord Cairns (4) for the terms of the bequest in *Home* v. *Pillans* (5), being held to point to a death under twenty-one, are hardly applicable to the present case, it being, as it is, unusual to provide for the family of a son who dies under twenty-one; whereas it is most usual, if not necessary, to provide for the family of a daughter who dies under twenty-one, this being ordinarily effected, as here, by making her share or legacy vest, not only at twenty-one, but at twenty-one or marriage under that age.

I think it is impossible to limit the operation of the clause or direction in question in the present case to the event of a son dying under twenty-one, or, in other words, to limit its operation to the period antecedent to the original vesting, until which no share is given to the parent at all. It appears to me to be a divesting clause or gift over operative at least during the widow's lifetime in a certain event, namely, death leaving issue, passing or carrying over to issue their deceased parent's share.

The real question is, I think, whether this clause is to operate after the death of the widow as well as during her lifetime, to the determination of which question the decision in *Home* v. *Pillans* (5) seems not to have any application. In *Bowers* v. *Bowers* (6) Lord Hatherley says (7): "There have been many cases in which the Court has said that to refer a clause

(1) [1897] 2 Ch. 39.
(2) 16 Beav. 46.
(3) (1857) 4 K. & J. 188, 191.
(4) L. R. 7 H. L. 398.
(5) 2 My. & K. 15; 39 R. R. 116.
(6) (1870) L. R. 5 Ch. 244.
(7) L. R. 5 Ch. 247.

providing for the divesting of a share to the time of the testator's own death, so as to make it merely a provision against lapse, is not a natural construction. It is not primâ facie to be supposed that he contemplates the death of the objects of his bounty in his lifetime, but he is to be considered as contemplating their death at some later period, unless he uses language which shews that he is referring to the time of his own death. Take the case of an immediate gift to A. and, 'in case he shall happen to die,' then to B. Here death being spoken of as contingent, the testator must be referring to death before some particular period; and as there is no other period to which it can be referred than his own death, we are obliged to treat the gift over as taking effect only in the case of A.'s dying in the testator's lifetime. But if the gift over is 'in case A. shall happen to die leaving issue,' we have a contingency, and there is no occasion to confine the death to any particular period."

For the purpose of determining the period within which the gift over is to take effect, I think it makes no difference what be the particular contingency or collateral event coupled with death upon which such gift over is to take effect; that is to say, whether it be death leaving issue, or death without issue, or death unmarried or under twenty-one. Lord Brougham himself says in *Home* v. *Pillans* (1) that it is beyond dispute that no difference whatever is made by the circumstance of the legatees over being the children of the first taker.

Now, in *O'Mahoney* v. *Burdett* (2) the particular contingency to be considered was death unmarried or without children, and Lord Cairns says in his judgment (3): "A bequest to A., and if she shall die unmarried or without children to B., is, according to the ordinary and literal meaning of the words, an absolute gift to A., defeasible by an executory gift over, in the event of A. dying, at any time, under the circumstances indicated, namely, unmarried or without children. And in like manner a bequest to X. for life, with remainder to A., and if A. die unmarried or without children to B., is, according to the

(1) 2 My. & K. 22. (2) L. R. 7 H. L. 388.
(3) L. R. 7 H. L. 393.

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ordinary and literal meaning of the words, an executory gift over, defeating the absolute interest of A. in the event of A. dying, at any time, unmarried and without children." It was decided in that case that there was no rule of construction arising from possible delay in the vesting of a gift which controls the natural meaning of the terms of the bequest, and that the ordinary and literal meaning of the words used to introduce a gift over in the case of the "death unmarried or without children" of a previous taker is not to be departed from otherwise than in consequence of a context which renders a different meaning necessary or proper.

Lord Hatherley in giving judgment says (1): "In those cases where the Court has found upon the face of the will a positive direction to pay over the personalty to the legatee, or to make a distribution among several legatees at a given time, the period of distribution being fixed, at which, as it appears from the face of the will, the whole estate was intended to be entirely disposed of and divided, and to pass from the hands of the executors, the Courts have laid hold of that circumstance to say, 'We hold this defeasance to be before that period of distribution arrives,' holding it to be an unreasonable construction of the testator's will to say that he directed on the one hand that the money shall be absolutely paid and divided and distributed, and put into the hands of those who, having it in their hands, will of course spend it without any farther trust, and on the other hand that a subsequent event, namely a certain person's dying childless after that distribution has taken place, should divest the property, that is to say, make it necessary for the executor to take steps to get back again, and recall that money which he has paid in order to hand it over to those who would take under the executory devise. The Courts have held that that was unreasonable." Later on his Lordship also says: "The period to which the executory devise will be referred will be the period of the death of the first taker, unless there are other circumstances and directions in the will which are inconsistent with that supposition."

In the present case the only words that can be suggested as

(1) L. R. 7 H. L. 403.

being words of payment, assignment, or distribution indicating the termination of a trust are the words "to whom I give and bequeath my residuary real and personal estate in equal shares," immediately followed by what I have called the divesting clause or gift over. I am unable to convince myself that this gift or bequest I have just read is, under the circumstances, a direction to hand over the several shares so as to terminate the trust. I think it is not more than an apportionment of interests under the will, especially as there are no other words to define the shares in which the property the subject of the gift is to be taken or divided. It is, no doubt, in form an immediate gift—not, however, expressed to be absolute—and it must, I think, be taken and construed subject to and with the immediate context, namely, the direction "that if any of his children should die leaving issue, such issue should take his or her deceased parent's share equally as tenants in common": see judgment of Giffard L.J. in *Bowers* v. *Bowers*. (1)

The result is that I do not find anything in this will to limit the contingency—namely, death leaving issue—to less than the whole life of the first taker, whether son or daughter; and I am of opinion that the divesting clause or gift over may operate, not only during the lifetime of the widow, but also after her death.

Solicitors for plaintiffs: *Swann, Green & Co.*
Solicitors for defendants: *Flux, Leadbitter & Neighbour.*

(1) L. R. 5 Ch. 244.

G. A. S.

JOYCE J.
1901
May 11, 13.

## *In re* FURNESS.
## FURNESS *v.* STALKARTT.

[1901 F. 131.]

*Will—Ademption—Gift by Will to Testator's Daughter—Direction to settle Part of Legacy—Subsequent Settlement upon Daughter by Testator during his Lifetime—Different Amount—Different Limitations—Ademption pro tanto of Settled Portion of Legacy.*

Testator by his will, dated in 1885, gave to his daughter on attaining twenty-five or marriage the sum of 20,000*l.*, and directed that 15,000*l.*, part thereof, should be settled upon her and her children. In 1893 the daughter married, and the testator then settled upon her and her children, by deed, 7300*l.* Consols upon trusts differing from those declared by the will in respect of the 15,000*l.* Upon the death of the testator in 1900 :—

*Held*, that the 7300*l.* Consols must be taken as an ademption pro tanto of the 15,000*l.*

George Furness by his will, dated January 23, 1878, after making various devises and specific and pecuniary bequests, directed that his trustees should hold the residue of his real estate and the trust funds of his will and the income thereof in trust for all and every his children and child living at his death or born in due time thereafter who being a son should attain the age of twenty-five years, or being a daughter should attain that age or marry under that age, and if more than one, equally. The testator declared that no division of his residuary estate should take place until his youngest child should attain the age of twenty-five years, or being a daughter should marry under that age with the consent of her mother, but his trustees should have full power to advance and pay to any of his daughters who should have attained that age, or should have married with the consent of their mother under that age, any portion not exceeding one-third of their respective shares of his converted personal estate, the same to be for their sole and separate use. The testator also declared that, as to two-thirds of the share of each daughter of and in his residuary real and personal estate, the same should be held upon trust

for her for life, and after her death, in trust for her children as therein mentioned, and in default of children, in trust for her next of kin.

By a codicil to his will, dated February 14, 1885, the testator directed that, instead of his residuary estate being divisible equally amongst all his children, each of his daughters should have the sum of 20,000*l.* at the age mentioned in his will, and that 15,000*l.*, part thereof, should be settled and go in the manner directed in his will with regard to two-thirds of the share of each daughter in his residuary estate, and the remaining 5000*l.* should go in the manner directed concerning the other third.

The testator died on January 9, 1900, leaving him surviving two sons and two daughters, all of whom had attained the age of twenty-five years.

The defendant Margaret Joanna Stalkartt, one of the testator's daughters, had on March 1, 1893, intermarried with the defendant C. E. G. Stalkartt. In contemplation of the marriage the testator had invested the sum of 7199*l.* 13*s.* in the purchase of 7300*l.* 2*l.* 15*s.* per cent. Consols, and transferred the same to the trustees of a marriage settlement dated February 28, 1893, upon trust for his daughter and her children as therein mentioned, and in default of children, then in trust for his daughter absolutely, should she survive her then intended coverture, but if she should die during the same, then in trust for her brothers and sisters and their issue as she should appoint, and in default of and subject to any such appointment, in trust for her statutory next of kin. Power was also thereby given to the defendant Margaret J. Stalkartt to appoint that after her death the income of the trust fund should be paid to the said C. E. G. Stalkartt during his life or any shorter period, he continuing a widower and unmarried.

This was a summons taken out by the trustee of the will against Mr. and Mrs. Stalkartt and their infant son, and G. J. Furness, one of the testator's sons, for the determination of the questions whether the legacy of 20,000*l.* was adeemed pro tanto by the sum settled by the marriage settlement; and, if so, whether the ademption should be borne by the 5000*l.*

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legacy given absolutely, and the 15,000*l.* settled legacy pari passu, or whether it should be borne wholly by the 15,000*l.*, or primarily by the 5000*l.* legacy.

*J. M. Stone*, for the plaintiff.

*Hughes, K.C.*, and *Vaughan Hawkins*, for Mr. and Mrs. Stalkartt. We admit that there must be an ademption; the only question is whether that ademption is to be borne by the settled or the unsettled portion of the fund given to Mrs. Stalkartt by the will and codicil. We submit that the intention of the testator was to give Mrs. Stalkartt the 5000*l.* absolutely, and that he intended the sum of 7300*l.* Consols, which he subsequently settled upon his daughter upon her marriage, to be in part satisfaction of the 15,000*l.* which he had directed to be settled upon her by his will. Mrs. Stalkartt, having received a benefit in anticipation of her legacy, must be treated as having received it in satisfaction of that part of the legacy which is of a similar character to what she has received.

*Younger, K.C.*, and *Stallard*, for G. J. Furness, took no part in the argument.

*Ingpen*, for the infant. The intention of the testator was to settle the 7300*l.* Consols upon his daughter in lieu of the 5000*l.* which under the will was to be left out of settlement. Alternatively, I submit that the 7300*l.* should be taken as an ademption of the settled and the unsettled funds rateably.

*Cur. adv. vult.*

May 13. JOYCE J. As a general rule, when a parent by will gives a legacy to a child not expressing the purpose with reference to which it is given, he is understood to be giving what is commonly called a portion; and in consequence of the leaning of Courts of Equity against double portions, if the testator afterwards in his lifetime advances a portion on the marriage of the child, the presumption arises that it was intended to be a satisfaction or ademption of the legacy either altogether or pro tanto.

A bequest of a sum of money to a daughter absolutely may

be adeemed by a subsequent settlement on her marriage, and the same is the case although the bequest to the daughter by the will is thereby settled upon her and her family; nor is the presumption in favour of ademption rebutted by the circumstance that the limitations of the portion under the will are different from the limitations in the settlement.

Again, if a legacy appears upon the face of a will to be bequeathed even to a stranger for a particular purpose, and a subsequent gift be made by the testator for the very same purpose, a presumption is raised primâ facie that such gift is an ademption.

In the present case the testator, by the joint effect of his will and codicil, provided for each of his daughters the sum of 20,000*l.*—15,000*l.*, part thereof, to be settled and go as in the will mentioned, and the remaining 5000*l.* to be paid to the daughter. Subsequently, upon the marriage of a daughter, he settled a sum of between 7000*l.* and 8000*l.*, the limitations under this settlement not being the same as those of the 15,000*l.* under the will.

It was not, and indeed could not have been, disputed that this sum settled upon the marriage must be taken as a pro tanto satisfaction of the 20,000*l.* legacy, but the question remained whether it must be taken and considered as in ademption of the 15,000*l.* or of the 5000*l.*, the two parts into which the testator divided the legacy of 20,000*l.* If the limitations of the settlement had been the same as those of the 15,000*l.* settled under the will and codicil, there would be no question but that the 15,000*l.* was adeemed pro tanto; but as the limitations do not correspond, the question raised by the summons arises.

To my mind, the truth and common sense of the matter appears to be that where a legacy to a child is taken to be adeemed by a subsequent portion it is because the testator is considered, in making provision for his children, to be performing a moral obligation, and if he afterwards, upon any occasion during his lifetime, provides a portion, he is thereby by anticipation performing pro tanto the obligation above referred to, and is in his lifetime intending to discharge or

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prepaying the legacy given by the will. This idea, I think, is well founded in reason and upon experience.

In the present case, which part of the testamentary provision for his daughters ought the testator to be considered as intending to discharge by the subsequent settlement? There are no special circumstances in the case. If the testator could be asked the question, I cannot seriously doubt that he would answer that the settlement was to be taken in satisfaction pro tanto of the settled portion of the legacy, there being no reason whatever that I can see why the daughter's absolute legacy of 5000*l.* should be taken away or diminished; and this accordingly I decide to be the result.

Solicitors: *Stones, Morris & Stone; Hopgoods & Dowson.*

G. A. S.

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JOYCE J. 1901 *May* 6, 7, 8, 9, 21.

## DAMPER *v.* BASSETT.

[1900 D. 985.]

*Easement—Way—Unity of Possession—User—Interruption—Acquisition of Right against Reversioner—Prescription Act*, 1832 (2 *& 3 Will.* 4, *c.* 71), *ss.* 2, 4.

The plaintiffs, being respectively the owner in fee and the tenant of Whiteacre, brought an action of trespass against the owner and occupier of the adjoining farm Blackacre, in driving a horse and cart from Blackacre across certain fields belonging to Whiteacre. The defendant set up a private right of way under the Prescription Act, 1832, and alleged an uninterrupted user for forty years. It appeared that A. was tenant of Whiteacre from 1860, and of Blackacre from 1877, till 1898:—

*Held*, (1.) following *Onley* v. *Gardiner*, (1838) 4 M. & W. 496; 51 R. R. 704, and *Battishill* v. *Reed*, (1856) 18 C. B. 696, that the unity of possession of the alleged servient and dominant tenements for the greater part of the forty years preceding the action was fatal to the defendant's claim under the Act; (2.) following *Baxter* v. *Taylor*, (1832) 4 B. & Ad. 72; 38 R. R. 227, that in the circumstances the user of the right of way for the last forty years would be no evidence of right as against the plaintiffs.

THE plaintiff Sarah Damper was the owner in fee simple of a farm known as Springhill Farm, in the parish of Penshurst, Kent, and the plaintiff Alice Gibbons was her tenant. The

defendant Elizabeth Bassett was part owner and occupier of an adjoining farm known as Holt's Farm. On May 28, 1900, the plaintiffs commenced this action for an injunction to restrain the defendant from trespassing on certain fields (numbered 441 and 436 on the Penshurst Tithe Map of 1840) belonging to Springhill Farm, and for damages. The plaintiffs by their statement of claim alleged that on March 16, 1900, the defendant, by her agent Percy Bassett, erected a gate in a fence between the two farms, and wrongfully drove a horse and cart from a field in Holt's Farm over the said two fields belonging to Springhill Farm into a public road between Fordcombe and Penshurst.

The defendant justified these acts by setting up a private right of way. By paragraph 4 of her defence she alleged as follows: "For upwards of forty years prior to the commencement of this action the defendant and her predecessors in title and persons employed by and serving them respectively have uninterruptedly and as of right passed and repassed with cattle, horses, wagons, carts, and carriages and on foot for all purposes along and over the roadway coloured red on the plan printed hereon between the points marked 'A' and 'B' on such plan."

The plaintiffs by their reply alleged that the way asserted by the defendant in paragraph 4 of her defence was not identical with the roadway coloured red on the plan printed on the defence, but commenced from a point 100 yards north of the point marked B on the plan, and further that one George Ashby was tenant of both Springhill Farm and Holt's Farm for many years until 1899, and that if any way now claimed by the defendant was then used by the occupiers of Holt's Farm it was not used as of right, but for the convenience and by the leave of Ashby.

It appeared from the evidence that Ashby was tenant of Springhill Farm (at first under a lease for fourteen years and afterwards as tenant from year to year) from 1860 until his death in 1898, and that he was also tenant of Holt's Farm from 1877 until his death, and that after his death his representatives remained in occupation of both farms until Michaelmas, 1899.

The evidence as to the alleged user of the way by the

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defendant and her predecessors in title was very slight, and was of a conflicting character. The result is sufficiently stated in the judgment.

*Hughes*, *K.C.*, and *Boxall*, for the plaintiffs. In order to acquire a title under the Prescription Act, 1832, it is essential that there should have been enjoyment of an easement as of right, and that that enjoyment should be an uninterrupted enjoyment for the full period of the twenty years or forty years, as the case may be, next before some action in which the claim shall have been brought in question—in this case before the commencement of the present action. The defendant has fulfilled none of these conditions, and the unity of possession of the dominant and the servient tenement arising from Ashby's tenancy of both farms is a complete answer to her claim: see ss. 2 and 4, and *Bright* v. *Walker* (1); *Monmouth Canal Co.* v. *Harford* (2); *Onley* v. *Gardiner* (3); *Battishill* v. *Reed.* (4)

*Younger*, *K.C.*, and *Church*, for the defendant. Unity of possession by a tenant operates as a suspension of the easement so long as the unity exists, but not as an extinguishment, and upon the severance of the ownership the easement revives: *Simper* v. *Foley* (5); *Ladyman* v. *Grave.* (6) It is true that those were both cases of ancient lights; but in the latter case Lord Hatherley L.C. expressly lays it down that for this purpose there is no distinction between an easement of light and any other easement. *Onley* v. *Gardiner* (3) and *Battishill* v. *Reed* (4) are inconsistent with the principles laid down in the more recent cases, and ought not to be followed: Gale on Easements, 7th ed. pp. 209, 210, 486. But as regards enjoyment a right of way does differ from a right to light, inasmuch as the use of a right of way is necessarily intermittent, and consequently abandonment is not readily inferred: Gale on Easements, 7th ed. p. 165; *Hollins* v. *Verney.* (7) If the

(1) (1834) 1 C. M. & R. 211; 40 R. R. 536.
(2) (1834) 1 C. M. & R. 614; 40 R. R. 648.
(3) 4 M. & W. 496; 51 R. R. 704.
(4) 18 C. B. 696.
(5) (1862) 2 J. & H. 555.
(6) (1871) L. R. 6 Ch. 763, 768.
(7) (1884) 13 Q. B. D. 304, 308.

defendant cannot make out a title under the Prescription Act, she is entitled on the ground of presumption of lost grant and by immemorial user, and we ask leave to amend for this purpose.

*Hughes, K.C.*, in reply. The application to amend ought not to be granted at this stage of the case.

That the user must be for the full period of forty or twenty years next before the action in which the right is claimed is shewn also by *Wright* v. *Williams* (1), *Richards* v. *Fry* (2), and *Parker* v. *Mitchell* (3), which are recognised and approved by Lindley L.J. in *Hollins* v. *Verney*. (4) In *Simper* v. *Foley* (5) Lord Hatherley expressly guarded himself against his decision being supposed to apply to cases under s. 2. The dictum in *Ladyman* v. *Grave* (6) is obiter only; it is contrary to the language of the statute; and it is inconsistent with the previous authorities. *Hollins* v. *Verney* (4) is an authority in the plaintiffs' favour. A right of way is expressly mentioned in s. 2, and it is not subject to the same considerations as a right to light, which is governed by s. 3.

*Cur. adv. vult.*

May 21. JOYCE J. This is an action of trespass by the owners of Springhill Farm against the defendant as owner, or part owner, of Holt's Farm, in driving a horse and cart from Holt's Farm across the meadows numbered respectively 441 and 436 on the tithe map of the parish of Penshurst, in the county of Kent, and forming part of Springhill Farm, to the highway leading to Penshurst. The defence is that the act complained of was done in exercise of a private right of way, which is thus pleaded in paragraph 4 of the statement of defence: [His Lordship read the paragraph.]

This I understand to be a plea of a right of way under the Prescription Act (2 & 3 Will. 4, c. 71); and the defendant contended, while the plaintiffs disputed, that the existence of

(1) (1836) 1 M. & W. 77; 46 R. R. 265.
(2) (1838) 7 Ad. & E. 698; 45 R. R. 816.
(3) (1840) 11 Ad. & E. 788.
(4) 13 Q. B. D. 304.
(5) 2 J. & H. 555.
(6) L. R. 6 Ch. 763, 768.

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the alleged right of way could be made out under the provisions of the 2nd section of that Act, and this was the issue which the plaintiffs came to the trial prepared to meet, and which was tried accordingly.

Now, the action was commenced on May 28, 1900. It appeared that from the year 1877 until his death in 1898 one Ashby, as tenant, was in occupation, not only of Springhill Farm, but of Holt's Farm, and his representatives remained in occupation until Michaelmas, 1899. In other words, for the twenty years, and for twenty-two years of the forty years, immediately preceding the action there was unity of possession of the alleged servient and alleged dominant tenement; so that the private right of way alleged, if it ever existed, could not during the last twenty-two years have been enjoyed as of right as an easement. This being so, the plaintiffs insisted upon the provisions of the 4th section of the Act and the decisions in *Bright* v. *Walker* (1), *Onley* v. *Gardiner* (2), and *Battishill* v. *Reed* (3), as being fatal to the defendant's claim to have acquired a right of way under the Prescription Act. I understood the defendant's counsel to contend that the two last-mentioned decisions have been overruled or ought not to be followed, relying upon certain dicta that have fallen from the Court in cases where the easement in question was the right to the access of light, which, it is well settled, stands, as compared with other easements, upon a special and peculiar footing under the provisions of the 3rd section of the Prescription Act. I do not consider myself entitled, nor indeed do I see any reason why I should desire, to hold myself not bound by the decisions of the eminent judges who decided the cases I have mentioned, and in particular *Onley* v. *Gardiner* (2) and *Battishill* v. *Reed*. (3) They have not either of them been overruled or, so far as I am aware, expressly disapproved of; and I must, therefore, follow them.

But at all events the case of *Baxter* v. *Taylor* (4) shews that the user, if any, of the alleged right of way at any time during the last forty years would, under the circumstances

(1) 1 C. M. & R. 211; 40 R. R. 536.
(2) 4 M. & W. 496; 51 R. R. 704.
(3) 18 C. B. 696.
(4) 4 B. & Ad. 72; 38 R. R. 227.

of this case, be no evidence of right as against the owners of the freehold of Springhill Farm—that is to say, against the present plaintiffs. As a matter of fact, it does not appear that at any time during Ashby's possession of the two farms the alleged way or right of way was actually used in any sense whatever. For all necessary purposes of communication between the two farms Ashby, at least for many years before his death, made use of an opening in the boundary fence at an entirely different place from that at which it is now alleged that the right of way existed. In the circumstances stated, I consider that the claim of the defendant to a right of way under the provisions of s. 2 of the Prescription Act fails as well by reason of the fact that there cannot possibly have been any continuous user of the kind required by the Act for either twenty years or forty years next before the action as also because the enjoyment, if any, during either of those periods would not, in my opinion, have been effectual as against the plaintiffs. It must not, however, be understood that in the absence of these legal objections I should, upon the facts proved, have decided in favour of the alleged right of way. The evidence was most conflicting, and apart from the objections I have mentioned I doubt whether the defendant could be taken to have succeeded in discharging the onus of proof which lay upon her even for the period between 1860 or 1880 and the commencement of the action. [His Lordship then referred to Ashby's occupation of Springhill Farm, and observed that it was obvious that from the commencement of Ashby's occupation in 1860 the owners of the freehold were not in a position to interfere with any exercise of the alleged right of way if it were in fact attempted. After some further reference to the evidence, his Lordship continued as follows:—]

Upon the fourth and last day of the trial, however, after all the evidence had been taken, the defendant's counsel, in concluding his address, when in fact it remained only for the plaintiff's leading counsel to reply, asked leave to amend by claiming, in addition to the claim under the Prescription Act, a title to the alleged right of way by virtue of a lost grant and by immemorial user. The plaintiffs naturally objected, insisting

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that if they were bound to meet such a case they would desire to make further inquiries and investigation, and probably to adduce additional or other evidence. It was suggested that it might be possible to shew that within the time of legal memory there had been unity of seisin, which I consider by no means improbable. For instance, the two farms might well have both formed part of the common lands of the same manor. Upon consideration I have come to the conclusion that I ought not to accede to this proposal to amend and practically direct a fresh trial, even upon the terms, I suppose, of the defendant paying the costs hitherto incurred. The reply delivered on behalf of the plaintiffs gave full notice of the legal objections to the defendant's claim, and the application to amend ought to have been made much earlier if at all. In my opinion the evidence adduced on behalf of the defendant at the trial would not support either of such claims as are sought at the last moment to be introduced by amendment.

[His Lordship, therefore, refused leave to amend, and he gave judgment for the plaintiffs.]

Solicitors: *Starling & Wright; Prior, Church & Adams, for Gorham, Warner & Son, Tonbridge.*

H. B. H.

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KEKEWICH J.
*May* 14; *June* 21.
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[1896 N. 331.]

*Debenture-holders' Action—Deficient Estate—Costs of Plaintiff—Solicitor and Client—Party and Party.*

The rule in creditors' and legatees' administration actions—that, where the estate is insufficient for payment of the debts or legacies in full, the plaintiff is entitled to his costs as between solicitor and client, and not as between party and party only—applies, upon the principle stated in *Thomas* v. *Jones*, (1860) 1 Dr. & Sm. 134, 136, equally to a debenture-holders' action, where the company's assets are insufficient for payment of the debentures in full.

*In re Queen's Hotel Company, Cardiff, Limited*, [1900] 1 Ch. 792, distinguished.

Decision of Kekewich J. reversed.

THIS was an action by the plaintiff, Miss Smith, "on behalf of herself and all other the debenture-holders" of the New Zealand Midland Railway Company, Limited, against the trustees of the debenture trust deed and the company to enforce the debenture security.

The usual judgment in a debenture-holders' action was pronounced, directing the usual inquiries, and the master having made his certificate, the action now came on for further consideration.

The company's assets being admittedly insufficient for the payment of the debenture debts in full, the question arose whether the plaintiff was entitled to have her costs taxed as between solicitor and client, or as between party and party only.

*Warrington, K.C.*, and *A. àB. Terrell*, for the plaintiff.

*Renshaw, K.C.*, and *J. F. Waggett*, for the defendants, the trustees.

*C. T. Mitchell*, for the National Bank of New Zealand, who had been found by the certificate to have a first charge upon the assets.

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*P. O. Lawrence, K.C.*, and *A. R. Kirby*, for the Industrial Investment Company, Limited, large debenture-holders attending the proceedings at their own expense.

*Sargant*, for other parties.

KEKEWICH J. The judge is placed in a very awkward position when a point submitted to him for determination is argued by counsel on one side and is not argued by counsel on the other. Obviously every one else wishes the argument to succeed, but, as has been said by Chitty J., it is the duty of the Court to protect the interests of absent parties. The question is whether the plaintiffs in a debenture-holders' action are entitled to solicitor and client costs when the fund is insufficient for payment of the creditors in full. It is true the matter was not decided in that dry form by Cozens-Hardy J. in *In re Queen's Hotel Company, Cardiff, Limited* (1), because he had before him a case in which the assets were not insufficient for the payment of the debentures in full. Nevertheless, Cozens-Hardy J. seems to have dealt with the matter as a general question, because he says, "The rules applicable to the administration of the estate of a deceased person have, I think, no relation to a mortgage suit, whether by an individual mortgagee or by one of a class suing on behalf of all. There is a sense in which every mortgaged property realized in an action is realized for the benefit of the puisne mortgagees and the mortgagor. I cannot make an exception in favour of the plaintiffs in these actions which, so far as I am aware, would be novel."

I know the danger of attempting to enlarge the expressions of a judge which are made with reference to the particular case and applying them to a class of cases which perhaps he is not fully considering. Still, there is the remark. Realizing, as I do, the distinction between the two cases, I think that this case may be best dealt with by not putting the authority of the judge out of sight, but still not considering myself bound by his decision. This is not a new point. For many years the rule as to costs in administration actions has been

(1) [1900] 1 Ch. 792, 794.

treated as settled, but not settled according to any principle which I can appreciate. It is true that the principle has been stated by Kay J. in *In re McRea* (1), quoting the language of Kindersley V.-C. in *Thomas* v. *Jones* (2); but I have heard several judges say they cannot understand the principle, and we have always followed the rule as a settled rule without caring much whether it rested on any principle or not. I am sure that this point has come before me in chambers, and that I have held that the rule in administration actions does not apply, partly because it would be wrong to apply to another class of actions a settled rule for which no sound principle can be found, and partly because the question is distinctly different. I think my duty is not to make a new rule which I should find a difficulty in grounding on principle, but to follow the course pursued by Cozens-Hardy J. in the case before him. I recognise that it is a question of great importance to the plaintiffs, and to the solicitors whom they instruct, and I will give the plaintiffs every facility for bringing the case before the Court of Appeal.

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The plaintiff appealed.

The appeal was heard on May 21, 1901.

*Warrington, K.C.*, and *A. àB. Terrell*, for the plaintiff. If the order of Kekewich J. is right, the result of it will be that although the plaintiff has by her diligence been the means of recovering a fund for the debenture-holders, including herself, she will get, upon the distribution of the fund, a smaller sum than the others; for while the others get the whole of their shares pro ratâ, she will find her share reduced by having to bear the difference between solicitor and client costs and party and party costs. This is very inequitable. There is no reported authority as to how, in a debenture-holders' action in which the assets are insufficient, the plaintiff's costs should be taxed; but we submit that the established practice in creditors' administration actions should be applied in such an action as this. The practice is founded upon principle; the principle

(1) (1886) 32 Ch. D. 613. (2) 1 Dr. & Sm. 134.

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being that, when one member of a class recovers a fund on behalf of that class, he is entitled to be indemnified against all costs. The learned judge appears to have considered that there was a "rule" that the costs in such a case as this should be as between party and party; but the question whether in any case costs should be allowed as between solicitor and client or party and party is one for the discretion of the Court in the particular case. If the Court thinks the action has been meritorious, it will give the plaintiff solicitor and client costs. It is unfair that a person who has done nothing towards the recovery of a fund should receive his full share, while the person who has borne the burden should get only part of his share.

The origin of the practice under which the plaintiff in a creditors' action now gets his costs as between solicitor and client where the estate is insufficient appears to have been this: formerly, where a bill for administration was filed by a single creditor, acting for himself alone and not for others, the other creditors were allowed to come in under the decree and prove their debts, but only on condition of their personally undertaking to contribute to the costs of the action. That was found inconvenient in practice because the plaintiff had to see to the creditors discharging their personal liability to make the contribution at the time they came in to prove their debts, for he could not afterwards demand contribution: accordingly, the Court adopted the practice, in a creditors' action, where the estate was insolvent, of making a direct order for payment of the plaintiff's costs as between solicitor and client out of the fund before any distribution: *Shortley* v. *Selby* (1); *Bluett* v. *Jessop* (2); *Tootal* v. *Spicer* (3); *Stanton* v. *Hatfield* (4); *Goldsmith* v. *Russell* (5); *In re Richardson.* (6)

[STIRLING L.J. *Hood* v. *Wilson* (7) is another authority to the same effect.]

The practice came also to be adopted in legatees' suits: *Cross* v. *Kennington* (8), *Thomas* v. *Jones* (9), where Kindersley V.-C.,

(1) (1820) 5 Madd. 447.
(2) (1821) Jac. 240, 243; 23 R. R. 35.
(3) (1831) 4 Sim. 510.
(4) (1836) 1 Keen, 358, 360.
(5) (1855) 5 D. M. & G. 547, 556.
(6) (1880) 14 Ch. D. 611.
(7) (1831) 2 Russ. & My. 687.
(8) (1848) 11 Beav. 89.
(9) 1 Dr. & Sm. 134, 136.

following Lord Langdale's decision in *Cross* v. *Kennington* (1), formulated the "principle" upon which the practice rested, whether in a creditors' or a legatees' suit: a principle which Jessel M.R., in *In re Richardson* (2), said had been "correctly laid down" by the Vice-Chancellor. The principle as so laid down was also recognised by Kay J. in *In re McRea.* (3)

[COLLINS L.J. The principle seems to be that where the fund recovered belongs exclusively to a certain class, any member of that class is entitled to solicitor and client costs, but any one else is entitled only to party and party costs.]

In two unreported cases of debenture-holders' actions, *Smith* v. *Law Guarantee and Trust Society,* before Stirling J. on July 2, 1895, and *Hodgson* v. *Martineau, Limited,* before North J. on April 10, 1897, the plaintiff was allowed solicitor and client costs on the Court being satisfied by evidence that the assets were insufficient for the payment of the debenture charges in full.

*In re Queen's Hotel Company, Cardiff, Limited* (4), followed by Kekewich J., has no application, for there the assets were more than sufficient to pay all the first debenture-holders in full. The question there was, in effect, between a mortgagee and the owner of the equity of redemption, and, as Cozens-Hardy J. held, the same rule as to costs must be applied as in an ordinary mortgagee's action.

We submit, therefore, that there is a principle applicable to this case under which the learned judge should have allowed solicitor and client costs. There is no rule to the contrary, and he had a discretion to allow those costs. That discretion he has not exercised, and therefore we ask that, if necessary, the case may be sent back to the learned judge with an expression of opinion that he has a discretion which he can exercise.

The cases upon the costs of an action in which there is a deficient estate are collected in Seton on Judgments, 5th ed. pp. 1233, 1265–6.

*Renshaw, K.C.*, and *J. F. Waggett*, for the defendants, the

(1) 11 Beav. 89.
(2) 14 Ch. D. 612.
(3) 32 Ch. D. 613, 615.
(4) [1900] 1 Ch. 792.

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trustees of the debenture trust deed. We think it only just that the plaintiff should have solicitor and client costs. The Court has a general discretion to allow them: *Andrews* v. *Barnes*. (1)

*P. O. Lawrence, K.C.*, and *A. R. Kirby*, for the Industrial Investment Company, Limited, debenture-holders. We feel the injustice of throwing any costs upon the plaintiff. The action is a meritorious one, and we do not say that the plaintiff ought to have to pay these extra costs.

COLLINS L.J. As I understand the judgment of Kekewich J., he conceived himself to be bound by some rule of practice which debarred him from giving to the plaintiff more than party and party costs. The plaintiff in this debenture-holders' action has, by her exertions and at her cost, succeeded in bringing into the power of the Court, for the benefit of the debenture-holders, a certain fund. That fund is not large enough to pay all the debenture debts in full, and she claims that, having by her exertions and at her cost secured for the benefit of the whole class, of which she is one, a particular fund not adequate to the complete satisfaction of all their claims, but earmarked and ascertained and exclusively belonging to that class, she ought, on a distribution of that fund, to be put in precisely the same position as all the other persons interested in it; and that the fund cannot be equitably distributed without compensating her for the extra expense she has incurred by her meritorious services, and which she will fail to get if she is only allowed party and party costs.

Apart from any doctrine of equity, it seems to me that the contention rests upon broad common sense antecedent to any decision of the Courts; and we are told that the Courts in a particular class of case—namely, creditors' administration actions—have in fact conceded this right, but that the principles upon which that was done were not formulated until many years afterwards. It seems to me that in making the concession the Courts were obeying that natural instinct of justice which does not require analysis before it is acted upon, and that this is an illustration of the cases in which the scientific person comes

(1) (1888) 39 Ch. D. 133, 138, 141.

in later, and analyzes and ascertains the principles underlying the actual facts. It seems to me that the principle is a simple one. Where the fund exclusively belongs to a particular class of persons, so that they may be indemnified in full by a distribution of that fund, and they are not seeking indemnity at anybody else's expense, then it seems to me, as a matter of common sense, that there should be a complete indemnity to the person through whose instrumentality this fund has been secured for the benefit of all, and that such a complete indemnity could not be given without allowing that person costs as between solicitor and client.

There seems, however, to have been some doubt whether there is any established practice of applying, in the case of a debenture-holders' action, the rule which is applied in an administration action, and Kekewich J. has felt himself constrained by what he considered the absence of any practice extending the benefit of the rule to the case of a debenture-holders' action. It seems to me that the principle is just as applicable to a debenture-holder's action as to any other action in which a fund exclusively belonging to the persons among whom it is to be distributed has been secured at the individual expense of one person. The principle of equal distribution applies no matter what the fund is.

We have had a very interesting discussion, and Mr. Warrington has brought before us historically the cases out of which the practice, as now understood, was evolved; and in the course of that evolution the principle was formulated, and, to a certain extent, extended—in fact, the formulation involved an extension. The principle was formulated in a creditors' administration action, where, there being a fund exclusively belonging to creditors, and not sufficient to pay them in full, the right of the creditor who had instituted the suit to get the costs as between solicitor and client out of that fund was recognised. Then in *Thomas* v. *Jones* (1) the principle was applied in the case of a legatee's administration action, where the particular fund belonged exclusively to the legatees. Kindersley V.-C. in that case stated what seems to me to be the principle upon

(1) 1 Dr. & Sm. 134.

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which the practice rests. He says (1): "If a creditor files a bill on behalf of himself and all the other creditors, and it turns out that the estate applicable to the payment of debts is insufficient, the estate belongs to the creditors exclusively; and therefore if a creditor has for the benefit of all the other creditors instituted a suit, in which he has recovered a fund, it is extremely unreasonable that the fund which would be divisible among the creditors pro ratâ should be applied in the payment of debts without recouping that creditor what he has properly expended in recovering the fund, and he is clearly entitled to his costs as between solicitor and client, and not as between party and party only. If the fund is sufficient to pay all the creditors, and there is a surplus, that surplus does not belong to the creditors, but to the residuary and general legatees. Suppose, as in some of the cases cited, the bill had been filed by one of the residuary legatees, all the other residuary legatees must under the old practice have been made parties; and although under the new practice they are not all necessarily made parties originally, yet it is necessary that they should be brought before the Court under the decree. In such a case as that there is no more reason why the residuary legatee filing the bill should have his costs as between solicitor and client than the other residuary legatees who are made parties originally, or brought before the Court under the decree; the principle is not applicable to such a case as that. In the same way, if in any ordinary legatee's suit the fund is not sufficient to pay creditors, the legatee who files the bill has no right to costs as between solicitor and client, as the fund does not belong to the legatees, but to the creditors; and he has no right to be allowed *extra* costs out of a fund belonging to another class of persons. But where a legatee files a bill, and the fund, though sufficient to pay the creditors, will only suffice to pay a portion of the legacies, what remains after satisfying the creditors belongs exclusively to the legatees. The legatee filing the bill, whether it is expressed or not that he files it on behalf of himself and the other legatees, is considered as representing them all. And as he has for the benefit

(1) 1 Dr. & Sm. 136.

of all the legatees recovered the fund which belongs exclusively to the legatees, I think the same principle as to costs applies as in the case of a creditor's bill where the fund recovered is insufficient to pay all the debts."

That seems to me to be a clear pronouncement by the learned judge that the practice rested on principle; and he applied the principle to something to which it had not theretofore been applied—namely, to the rights of legatees as distinguished from creditors. Therefore, in the present case, it seems to me that we are clearly bound by the principle, which is applicable to this case as much as to the particular case to which it was applied in *Thomas* v. *Jones*. (1)

But the matter does not rest there, because we have had brought before us two orders—and I daresay they are samples of many others—one made by Stirling J. and the other by North J., in debenture-holders' actions, in which the same principle was applied, and it appears that those orders were intended to give effect to a principle, apart from any special circumstances.

The case of *In re Queen's Hotel Company, Cardiff, Limited* (2), which Kekewich J. apparently thought governed his decision, seems to me to have no real bearing on this case. That was really a mortgagees' action, and if solicitor and client costs had been allowed to the plaintiffs there, they would have been allowed at the expense of somebody else—either of the mortgagor or, possibly, of the puisne mortgagees. The decision does not affect the principle of a case like the present, where a fund belongs exclusively to a particular class, and is not adequate to satisfy all the claims of that class upon it. Where the fund is sufficient, I can see reasons why different considerations might apply, and it may be that the Courts of Equity have felt that there was no established rule that the same equitable principle should be applied in cases where the fund is more than sufficient. It is not necessary, I think, to deal with what the practice of the Courts of Equity is in such cases, because, as it seems to me, the principle that we have to apply to-day is perfectly well established, and rests upon the broad basis of common sense.

(1) 1 Dr. & Sm. 134. (2) [1900] 1 Ch. 792.

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I think that the learned judge was wrong in thinking himself bound to deprive the plaintiff of her costs as between solicitor and client, and that, therefore, the appeal ought to be allowed.

STIRLING L.J. The short question raised by this appeal is this: Whether a plaintiff who brings an action on behalf of himself and all other holders of debentures issued by a company for the purpose of realizing the property on which the debentures are charged, is entitled, when that property proves insufficient for payment of the debentures in full, to costs as between party and party or as between solicitor and client. The learned judge has thought that under the circumstances the plaintiff was entitled to party and party costs only. It is well known that in administration actions brought by creditors or legatees a practice prevails which would lead, if applied here, to a different conclusion. A practice has been for many years established that where a creditor or legatee brings an action for the administration of the estate of a deceased person, and the fund realized proves insufficient for payment of the debts or of the legacies, as the case may be, in full, the plaintiff is allowed his costs as between solicitor and client; but where the fund realized is more than sufficient for payment of the debts or legacies, as the case may be, in full, then the plaintiff as a general rule is only allowed costs as between party and party. The question which we have really to consider is whether the practice in cases of actions by creditors and legatees where the fund proves insufficient for payment of the debts or legacies in full rests on any principle, or is a mere anomaly in the nature of a rule of thumb, for the purpose of, as far as may be, redressing an apparent injustice.

Now, it is not immaterial in considering this question to see how the practice originated. Apparently it was established as regards creditors' suits about the year 1831, for we find that on July 13 of that year Shadwell V.-C., in *Tootal* v. *Spicer* (1), made an order in accordance with that practice, and two days later—on July 15—in *Hood* v. *Wilson* (2), application for a similar order was made by Sir Edward Sugden to the Lord

(1) 4 Sim. 510. (2) 2 Russ. & My. 687.

Chancellor, and it was opposed on the ground that no general practice to that effect had been established, and that Lord Eldon, though repeatedly asked so to do, had uniformly refused to lay down any such rule; but the Lord Chancellor said he saw no reason why he should depart from what appeared to be the rule adopted in other branches of the Court, and he therefore gave costs as between solicitor and client. No case has been brought to our notice (and I am not aware of any) in which the principle upon which that rule was laid down was stated by the learned judges who acted upon it, and no such principle appears to have been formulated until the year 1860—nearly thirty years afterwards, when the question came before a most eminent judge, Kindersley V.-C., who was asked to apply the practice to another class of cases.

Earlier cases had established the rule as regards creditors' suits, but in *Thomas* v. *Jones* (1) Kindersley V.-C. was asked to extend it to the case of a legatee's suit, as to which the practice appears not to have been settled at that date; and he had to consider whether the practice, which was well established at that time as regards creditors, did or did not rest on principle, and he held that it did rest on principle, and he stated that principle. Putting it shortly, he said that if a creditor had for the benefit of all the other creditors instituted a suit in which he had recovered a fund, it was extremely unreasonable that the fund which would be divisible among the other creditors pro ratâ should be applied in the payment of the debts without recouping that creditor what he had properly expended in recovering the fund; and the Vice-Chancellor held that the legatee as well as the creditor was entitled to his costs as between solicitor and client, and not as between party and party only. The Vice-Chancellor recognised the other branch of the practice—namely, that where the fund is more than sufficient for payment of debts the plaintiff creditor only gets party and party costs; and he pointed out that if the fund is sufficient to pay all the creditors and there is a surplus, that surplus does not belong to the creditors, but to the residuary and general legatees; and he observed (and I apprehend that

(1) 1 Dr. & Sm. 134.

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is the principle upon which the practice rests) that the plaintiff has no right to be allowed extra costs out of a fund belonging to another class of persons. If a creditor sues a living man for a debt, he only recovers his debt and party and party costs; and if he sues the executors of a dead man for a debt he only recovers against the executors party and party costs, the action being an action at law; and a Court of Equity in an administration action gives the creditor suing, or the body of creditors suing, no more as against the estate of the deceased.

The only difficulty which arises with reference to whether the practice rests on principle or not appears to me to be this, that Courts of Equity have not been quite logical in following out the principle which was laid down by Kindersley V.-C. If it were true that in all cases where a creditor has, for the benefit of all the other creditors, instituted a suit and recovered a fund he should get his costs as between solicitor and client, and not as between party and party only, it would seem logical that the rule ought to apply where the fund recovered is sufficient to pay the debts in full. The plaintiff creditor would not, indeed, be entitled to get those costs as against the representative of the deceased, or out of his estate; but, inasmuch as the creditors come in and get the benefit of the action, it would seem right that the plaintiff, if this rule be founded on principle, should get them out of the fund which has been acquired by his exertions for the benefit of all the creditors—that is to say, that they should be taken in the first instance out of the fund which is available for payment of the creditors' debts, and then the balance distributed rateably among the creditors; and, in point of fact, as has been pointed out by Mr. Warrington in his very excellent argument, that course was adopted in *Stanton* v. *Hatfield* (1) and in *Goldsmith* v. *Russell*. (2) In both those cases actions were brought for the purpose of setting aside fraudulent transactions by which creditors were prejudiced, and in both an order was made on the basis which I have suggested, namely, that the costs of the plaintiff as between party and party should be paid out of the fund which was recovered, and the extra costs of the

(1) 1 Keen, 358. (2) 5 D. M. & G. 547.

plaintiff—that is to say, the difference between the solicitor and client costs and the party and party costs—should be paid pro ratâ by all the creditors who partook of the benefit of the suit. But I understand that those cases are both based upon special circumstances. The only special circumstance which I can detect is the setting aside of a fraudulent transaction, though it may be possible on a careful examination of the facts to detect something else, and I do not express an opinion about that; but in practice (and in that I am borne out by the statement of Mr. Carrington, the registrar, whose experience in these matters is very great) such an order as was made in *Stanton* v. *Hatfield* (1) and *Goldsmith* v. *Russell* (2) is not of course, but is only made under the most special circumstances. That is really the only difficulty. In other respects, the principle stated by Kindersley V.-C. is a most reasonable one, namely, that where the fund recovered proves insufficient for payment of all the creditors in full, or of the class of persons represented by the plaintiff in full, the plaintiff should be entitled to an indemnity from the persons that he represents in respect of the costs which he has incurred on their behalf, and should therefore have his costs as between solicitor and client and not as between party and party. Why is not this principle applicable in the case of a debenture-holder bringing an action on behalf of himself and all other debenture-holders for the realization of the debenture-holders' security and obtaining a fund which is insufficient for the payment of the claims in full? The injustice, or apparent injustice, sought to be avoided is exactly similar in the case of creditors' actions and of debenture-holders' actions; and I confess I do not see why the principle should not be applied. In *In re Richardson* (3) and in *In re McRea* (4) the practice to which I have referred is treated by Sir George Jessel and by Kay L.J., when Kay J., as based on principle, and, at this distance of time, I conceive that we must so treat it and deal with it. I think, therefore, that, it being based on principle, it ought to be applied to debenture-holders' actions.

(1) 1 Keen, 358.
(2) 5 D. M. & G. 547.
(3) 14 Ch. D. 611.
(4) 32 Ch. D. 613.

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I do not see that the two cases that were decided by Cozens-Hardy J., *In re Queen's Hotel Company, Cardiff, Limited* (1), and also *In re Vernon Tin Plate Co.* (2), affect the present case at all. In those two cases the debenture-holders' actions were brought against, not merely the company which issued the debentures, but against other debenture-holders who ranked after the class represented by the plaintiffs. In both cases the class of persons represented by the plaintiffs obtained payment of their debentures in full out of the fund which was realized, and the question was whether, the assets being sufficient to pay the holders of the first debentures in full, but not sufficient to pay the subsequent debenture-holders, the plaintiffs were entitled to their costs as between solicitor and client. Cozens-Hardy J. appears to me to have reasoned in a way which is quite irresistible. The plaintiffs were simply mortgagees, enforcing their security against the mortgagors and their incumbrancers. Suppose there were no subsequent incumbrancers, and the mortgagors stood alone, the plaintiffs would have been entitled simply to their costs as between party and party. The general rule of the Court is to that effect. What difference does it make that they had assigned their equity of redemption by charging it? Why should the assignees of the equity of redemption, the second debenture-holders, be in a worse position than the mortgagors themselves? The learned judge considered that there was no reason, and therefore that the ordinary rule must prevail. That is quite in accordance with the rule laid down in *Thomas* v. *Jones* (3), that the plaintiff has no right to be allowed extra costs out of a fund belonging to another class of persons; but it does not apply to all in this case, because the mortgagors get nothing after realization of the property. The whole of the fund belongs to the debenture-holders.

I have only this further remark to add, that I am not quite certain—it may be that my doubts would disappear on further consideration—whether the principle was accurately applied by Kay J. in *In re McRea* (4); but here again the case before us differs entirely from that case, which does not in the least

(1) [1900] 1 Ch. 792.
(2) [1900] 1 Ch. 792.
(3) 1 Dr. & Sm. 134.
(4) 32 Ch. D. 613.

stand in the way of the conclusion at which I have arrived. I therefore agree that this appeal ought to be allowed and the order of the judge varied by directing the costs of the plaintiff to be taxed as between solicitor and client.

*C. T. Mitchell*, for the National Bank of New Zealand, having a first charge on the company's assets, asked for his costs, and they were accordingly ordered to be added to his security.

On June 21 the Industrial and General Investment Company, Limited (debenture-holders having liberty to attend the proceedings), moved, in accordance with leave granted in that behalf by the Court of Appeal, for an order that their costs directed to be taxed by the order on further consideration might be taxed as between solicitor and client.

KEKEWICH J. directed that their costs of all applications made by them in the action upon which substantive orders had been made, and also of appearing on the further consideration, should be taxed as between party and party; but that their costs of certain proceedings in New Zealand and before the Privy Council, which the Court authorized them to take, should be taxed as between solicitor and client.

Solicitors: *W. H. Smith & Son; Golding & Hargrove; Slaughter & May; Blyth, Dutton, Hartley & Blyth.*

G. I. F. C.

KEKEWICH J.

1901

*June* 5.

## *In re* MADDOCK. LLEWELYN *v.* WASHINGTON.

[1901 M. 397.]

*Administration of Assets—Order of Administration—Insufficiency of General Personalty—Residuary Bequest—Trust affecting Conscience of Legatee as to part—General or Specific—Estate Duty—Incidence—Will exercising Power of Appointment—Appointed Fund—Residue.*

A testatrix by her will gave her residuary estate to A., who was also an executor of the will, and by a subsequent memorandum, acknowledged by A. to be a valid trust, directed that a portion of the residue should be held in trust for certain other persons. Apart from the portion bound by the memorandum, the residuary personalty was insufficient for payment of the debts of the testatrix :—

*Held*, that, although the trust was specific, it was not a specific bequest, inasmuch as the title of the cestuis que trust was dehors the will :

*Held*, therefore, that the debts were payable rateably out of the portion affected by the memorandum and the portion not so affected.

The testatrix, having a general testamentary power of appointment over a fund, appointed the fund by her will :—

*Held*, following *In re Treasure*, [1900] 2 Ch. 648, and dissenting from *In re Moore*, [1901] 1 Ch. 691, that the estate duty in respect of the fund was payable out of the fund itself.

Sarah Maddock, spinster, who died on December 14, 1898, by her will dated January 11, 1897, appointed the plaintiff and the defendants, Susan Washington and J. F. Maddock, trustees and executors thereof, and she appointed and bequeathed to them the one-third share of the sum of 18,000*l.*, over which she had a testamentary power of appointment under the will of her father, upon trust to pay the income to Susan Washington for life, and after her death to divide the principal of her said share among certain charities, and she bequeathed all her real estate and the residue of her personal estate to Susan Washington absolutely.

By a memorandum signed by the testatrix on January 17, 1897, she requested that all the money she had saved should go to certain persons therein named. It was admitted by Susan Washington that this memorandum gave rise to a valid trust in favour of the persons therein named.

By an order of March 14, 1900, made upon a summons to determine the scope and effect of this memorandum, it was declared that all the testatrix's property belonging to her at her death was bound by the memorandum except a freehold house therein specified, a sum of 385*l.*, being the apportioned income to the date of the testatrix's death arising from certain trust funds to the income of which the testatrix was entitled for life, and her furniture, farming stock, and household goods and effects.

In the course of administration it was found that the testatrix's residuary personal estate (apart from the portion affected by the memorandum) was insufficient for the payment of her debts, the estate duty on her general personal estate and the costs of administration, and the question arose out of what funds the deficiency ought to be borne and paid.

A further question arose whether the estate duty payable in respect of the fund appointed in favour of the charities was payable out of the fund or out of the residue.

This summons was now taken out to determine these questions.

*E. Ford*, for the summons.

*Warrington, K.C.*, and *T. H. Carson, K.C.*, for Susan Washington. The trust arising from the memorandum cannot be treated as a bequest at all; it is an obligation affecting the conscience of the legatee, and the cestuis que trust cannot have the property exonerated for their benefit. Their title is dehors the will, and the estate must be administered exactly as if the memorandum had never existed. The point appears never to have been actually decided, but in *Cullen* v. *Attorney-General for Ireland* (1), where the question was whether a legacy subject to a secret trust in favour of a charity was liable to legacy duty under the Irish Stamp Acts, or fell within an exemption in favour of charities, Lord Westbury lays down the principles governing secret trusts and trusts affecting the conscience of the legatee, and shews that the title of the cestuis que trust thereunder is not testamentary.

(1) (1866) L. R. 1 H. L. 190, 198.

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[They also referred to *Wallgrave* v. *Tebbs* (1) and *Rowbotham* v. *Dunnett.* (2)]

*Renshaw, K.C.*, and *Vaughan Hawkins*, for the cestuis que trust under the memorandum. *Cullen* v. *Attorney-General for Ireland* (3) was decided upon the construction of the Irish Stamp Acts, which are set out in the report, and has no application to this case. This is a question of the intention of the maker of the memorandum operating on the conscience of the legatee, who is also executrix. This memorandum was a document binding Miss Washington to deal with the assets in a particular way. Instead of drawing a codicil, the testatrix has adopted this mode of binding Miss Washington. The conjoint effect of the will and memorandum is that only that which is not given away by the memorandum is left as residue. The testatrix has in substance directed Miss Washington to treat this money as if she had disposed of it by codicil as a specific legacy, and we submit that it ought to be treated on that footing. The result is that the residuary estate unaffected by the memorandum is primarily liable for the payment of debts, and the deficiency must be borne rateably by the property passing under the memorandum and the real estate of the testatrix: *Tombs* v. *Roch.* (4)

*P. S. Stokes*, for the charities, upon the question as to the incidence of the estate duty referred to *In re Treasure* (5) and *In re Moore.* (6)

KEKEWICH J. This is a new point. Nobody has pretended to say that it is covered by any decision. Mr. Warrington has cited to me a dictum of Lord Westbury's in a case in the House of Lords of *Cullen* v. *Attorney-General for Ireland.* (3) Mr. Renshaw truly says that that case does not touch the case in hand. There the question was whether duty was payable under certain Acts of Parliament, and it could be disposed of and really was disposed of upon the construction of those Acts of Parliament. Therefore Lord Westbury's dictum was obiter

(1) (1855) 2 K. & J. 313.
(2) (1878) 8 Ch. D. 430.
(3) L. R. 1 H. L. 190.
(4) (1846) 2 Coll. C. C. 490, 509.
(5) [1900] 2 Ch. 648.
(6) [1901] 1 Ch. 691.

only, and does not carry the weight of a decision; but it is a weighty remark nevertheless, and entitled to the greatest respect. Lord Westbury there lays down a general principle about which there can be no doubt. He says (1): "Where there is a secret trust, or where there is a right created by a personal confidence reposed by a testator in any individual, the breach of which confidence would amount to a fraud, the title of the party claiming under the secret trust, or claiming by virtue of that personal confidence, is a title dehors the will, and which cannot be correctly termed testamentary." That carries me some way, although not the whole way. The argument on behalf of those who claim to have the whole of this fund paid without any deduction for funeral and testamentary expenses and debts is that it is a specific bequest. The fallacy of that argument seems to me to lie in the use of those two words conjointly. It is specific. There is no question about that. The testatrix says in this memorandum, "All the money I have saved" is to be held for certain purposes, and that has been defined by the Court to be a specific description. It is specific, but it is not a bequest, and that is where the argument breaks down. It is not a bequest, because it is not contained in the will or in a testamentary instrument—that is, an instrument which could be proved with the will. If the testatrix had made a specific bequest of all the money which she had saved to Miss Washington, the result would have been, of course, that the trust which she has here declared, and which is enforceable against Miss Washington, would have operated as regards that specific thing. But that is not what she has done. She has given Miss Washington, not a specific thing, but the residue, and then she has declared this particular trust of some part of the residue. The title of those claiming under the trust is, as Lord Westbury says, dehors the will. What is the result? It is the conscience of the original donee constituted a trustee which is affected, and the conscience is affected with reference to that which she receives, and not with reference to that which she does not receive. It must operate in that way. The cestuis que trust under this memorandum cannot

(1) L. R. 1 H. L. 198.

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make Miss Washington accountable for all the money which the testatrix has saved, but only for that which comes to her under the gift of residue and which, when the accounts are taken, represents the money she has saved. If she had given, for instance, "all my real and all my personal estate" to Miss Washington, and had then constituted a secret trust of "all my personal estate," or of "all my real estate"—that is to say, of one of the divisions—those claiming under that trust could not have insisted upon having this property kept clear for their benefit, instead of having the estate administered in the ordinary course. All that they would have been entitled to would have been what was left when the estate had been properly administered. Miss Washington is accountable for what she receives; but she only gets it as residuary legatee, and, getting it as residuary legatee, she must ascertain what proportion of the residue represents money which the testatrix has saved. The trust affects her conscience as to that which reaches her hands, and not as to that which was saved by the testatrix. The answer to the first question raised by the summons will be that the debts of the testatrix, the estate duty on her general personal estate, and the costs of administration are payable rateably out of the portion of her residuary personal estate bound by the memorandum and the portion not so bound.

Upon the second question, notwithstanding the decision of Buckley J. in *In re Moore* (1), his Lordship adhered to his previous decision in *In re Treasure* (2), which was a considered judgment, and, having regard to the unfortunate difference of opinion which had arisen, he thought it better to do so without comment, leaving it to the Court of Appeal to deal with the question when it should arise. There would be a declaration that the estate duty payable in respect of the appointed fund was payable out of the fund itself.

Solicitors for all parties: *Ridsdale & Son, for Heaton & Son, Burslem.*

(1) [1901] 1 Ch. 691. (2) [1900] 2 Ch. 648.

H. B. H.

## MORTGAGE INSURANCE CORPORATION, LIMITED v. CANADIAN AGRICULTURAL, COAL AND COLONIZATION COMPANY, LIMITED.

KEKEWICH J.

1901

*May* 21; *June* 13.

[1893 M. 2300.]

*Costs—Taxation—Debenture-holders' Action—Trustees' Costs—Same Solicitor appearing for Trustees and Company—Disallowance of Company's Costs—Right of Trustees to Full Set of Costs—Retainer—Joint or Separate.*

Where debentures are secured by a trust deed, the trustees are properly added as defendants to a debenture-holders' action, and where the trustees and the company appear by the same solicitor, although the company are not entitled to costs, all the costs of the defendants, except any separate costs of the company, ought to be paid out of the assets before distribution amongst the debenture-holders, upon the ground that, subject to that exception, those costs must be treated as incurred by the trustees; and for this purpose the order directing taxation should contain a direction that in taxing the costs of the trustees the taxing master should allow them a full set of costs, except as regards any separate costs of the company, notwithstanding that the trustees and the company have appeared by the same solicitor.

THIS was an action brought by the Mortgage Insurance Corporation, Limited, on behalf of themselves and all other holders of first mortgage debentures of the defendant company, to enforce their security by foreclosure or sale. Originally the action was brought against the defendant company alone, but, after a motion had been made by the plaintiffs for a receiver, the trustees for the first mortgage debenture-holders and the trustees for the second mortgage debenture-holders were added as defendants. There were not, however, two separate bodies of trustees, the defendants King and Trotter being trustees for the first mortgage debenture-holders, and the defendants King and Richardson being trustees for the second mortgage debenture-holders. By the master's certificate, made in pursuance of the judgment in the action, it was found that the available funds of the defendant company were insufficient for payment of the first mortgage debentures in full. The order on further consideration, dated June 29, 1900, provided for the apportionment of what remained after payment of costs among the first

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debenture-holders rateably in proportion to the amounts certified to be due to them. The order also referred it to the taxing master to tax the costs of the plaintiffs and defendants other than the defendant company (whose costs were disallowed), and directed those taxed costs to be paid. The same solicitor, Mr. H. F. Pollock (recently deceased), appeared for all the defendants, and upon the taxation of the trustees' bill of costs he claimed to be paid his full costs, notwithstanding that no costs were allowed to the defendant company. The taxing master, however, took the point that, according to the principle of *In re Colquhoun* (1), two-thirds only of the bill ought to be allowed, on the ground that, Mr. Pollock having represented the defendant company also, he must look to them for payment of the remaining one-third.

Before the taxation was completed Mr. Pollock, on behalf of the trustees, moved that the order on further consideration directing taxation and payment of the costs of the plaintiffs and of the defendants other than the company might be altered by adding a direction that the defendants, the trustees, should have a full set of costs allowed to them.

In an affidavit filed in support of this application, he deposed that he, as a partner in the firm of Paine, Son & Pollock, acted for the defendant company when this action was commenced in 1893; that when the trustees were added as defendants he, as a member of the said firm, was instructed to represent them jointly and severally with the company; that upon the dissolution of the firm in 1894 he was again consulted by the company and the trustees, and was instructed to act for them jointly and severally; and that he was now the solicitor on the record for all the defendants.

Paragraph 4 of the affidavit was as follows: "My late firm's and my own retainer on behalf of the defendants, which is a verbal one, is a joint and several one, and the defendants are jointly and severally liable for my late firm's and for my own costs of the action." In conclusion he submitted that the trustees were entitled to an indemnity out of the estate for the costs for which they were liable.

(1) (1854) 5 D. M. & G. 35.

*Whinney*, for the trustees. This is a joint and several retainer, and the trustees are jointly and severally liable for all the costs of the action. The trustees of the first debenture-holders are the substantial defendants to this action, and they are entitled to be indemnified out of the assets for the costs for which they are properly liable. On these grounds I ask that the trustees may be allowed a full set of costs, notwithstanding that they have appeared by the same solicitor as the company. [He cited *In re Colquhoun* (1); *Watson* v. *Row* (2); *Smith* v. *Dale* (3); *Furlong* v. *Scallan* (4); Cordery on Solicitors, 3rd ed. p. 75.]

*George Lawrence*, for the plaintiffs, left the matter in the hands of the Court.

KEKEWICH J. intimated that he would see the taxing master before giving judgment.

June 13. KEKEWICH J. (after stating the facts). The taxing master proceeded to tax the bill on the principle established by *In re Colquhoun* (1), and there can be no question but that in so doing he was perfectly right, and, indeed, this is admitted by the application now under consideration for an alteration of the order by a direction which will give the solicitor his full costs. That application is made pending the taxation with a view of setting the matter right at an early stage, and avoiding useless expenses. Indeed, it is obvious from what I have already said that if the taxation had proceeded to certificate, and had been followed by a summons to review, that summons must have failed. The course adopted, therefore, is convenient. It has been endeavoured to base the application on the ground that the retainer by the trustees of the solicitor was joint and several, and that they are therefore liable for the costs of all the defendants, and that consequently all the costs ought to be paid out of the fund. This ground is put forward in an affidavit of the late Mr. H. F. Pollock, who acted as the solicitor for the defendants. His death has unfortunately rendered it impossible to ascertain what actually

(1) 5 D. M. & G. 35.
(2) (1874) L. R. 18 Eq. 680.
(3) (1881) 18 Ch. D. 516.
(4) (1875) Ir. R. 9 Eq. 202.

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took place when he was instructed, and I am obliged to take his affidavit for what it is worth without further explanation. It renders little if any assistance in determining what was the bargain between him and his clients, the trustees. He, indeed, says that he was instructed by the company and the trustees to act for them jointly and severally, and he states that the retainer was a joint and several one, and that the defendants are jointly and severally liable for the costs of the action. It is, I think, impossible to arrive at this conclusion from the general statement made in the affidavit. The effect of such a retainer as Mr. Pollock describes was discussed by Bacon V.-C. in *In re Allen* (1), and towards the conclusion of his judgment the Vice-Chancellor sums up the position thus: "It is a joint retainer to this extent. 'We together undertake to pay you, but not that any one of us will pay you all; we jointly contract with you and with ourselves that we will pay you the whole amount of your charges.'" In this particular case there is the further difficulty that in the first instance the company were the only defendants, and Mr. Pollock was retained by the company before the trustees were added, and it would be strange if when the trustees were added they gave a retainer making them liable jointly in the sense contended for—that is, liable not only for their own costs, but also for those of the company. Mr. Pollock's affidavit endeavours to get over this by saying that when the trustees were added as defendants he was instructed to represent them jointly and severally with the company; but, apart from the decision in *In re Allen* (1), I could not attribute the effect contended for to such retainer, and *In re Allen* (1) is conclusive against it.

There is, however, another ground which is mentioned in Mr. Pollock's affidavit, and which deserves consideration. It is said that the trustees are entitled as such to an indemnity out of the estate for the costs for which they are liable. The principle is sound, but requires some care in application. The trustees for the second mortgage debenture-holders have no estate, the funds being insufficient to pay the first mortgage debenture-holders; and as regards them, therefore, the indem-

(1) (1879) 11 Ch. D. 244, 249.

nity is worth nothing; but there are not two separate bodies of trustees, and all the trustees have appeared together, so that the costs incurred by them are really the costs of the trustees for the first mortgage debenture-holders. In other words, if the latter are entitled to an indemnity for all the costs for which they are liable, there will remain no costs to be paid by the trustees for the second mortgage debenture-holders. It does not follow that the solicitor will thus be paid in full all the costs of all the defendants, and he ought not to be paid out of the funds any costs for which the company are, but the trustees are not, liable. If the action had been constituted as it now is in the first instance, and the trustees had originally been made defendants, these costs would have been trifling. This I say on the authority of the taxing master whom I have consulted, and who has the bill before him. It happens, however, that a motion for a receiver was made before the trustees were added as defendants. They were added before the order appointing a receiver was drawn up, and probably because the necessity of adding them was discovered when the motion was made; but some costs must have been incurred on behalf of the company before this was done, and for those costs the trustees cannot be liable. To such costs, therefore, their right of indemnity cannot extend, and these, together with any other separate costs of the company, must be left unprovided for.

Subject to the exception just noticed, I think it right that in a case like this, where the company and trustees for debenture-holders appear by the same solicitor, all the costs of the defendants should be paid out of the funds before distribution between the debenture-holders, not because the company can claim costs, which they cannot, but because the costs must, subject to that exception, be treated as incurred on behalf of the trustees. If the company and the trustees appear by separate solicitors the costs of the trustees would be substantially the same as here, where one solicitor appears for both. Where debentures are protected by a covering deed the trustees of that deed are necessary parties, and they can and often do render the Court useful assistance. It is not desirable to discourage them by making difficulties about the payment of their costs,

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and there is no advantage in driving them to instruct a solicitor separate from that of the company, who presumably is possessed of information and has the means of getting it. The company are little more than nominal defendants in such actions.

I have consulted with the taxing master, Mr. Shearme, and have asked him to consider what words would be apt to give the trustees the costs to which I hold them to be entitled. He has been good enough to do this and submit the language to some of his colleagues, so as to secure a settled practice, which is of importance in all proceedings, and especially in the matter of costs. I am afraid that the introduction of this language cannot be effected by a verbal amendment of the order on further consideration, and that there must be a new order. That is to be deprecated as causing further expense; but it is justified by the advantage of definite instructions expressed in clear terms. The order will be that, in taxing the costs of the defendants other than the company under the order on further consideration (which are to include the costs of the present order), the taxing master is to allow to the said defendants a full set of costs, notwithstanding that the said defendants and the defendant company have appeared by the same solicitor.

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The form of order was as follows:—

Upon motion this day made unto this Court by counsel for the defendants Sir Henry Seymour King, Charles William Trotter, and Joseph Myers Richardson, and upon hearing counsel for the plaintiffs, and upon reading an order dated the 29th of June, 1900, and an affidavit of Harry Frederick Pollock filed the 29th of March, 1901:

This Court doth order that in taxing the costs directed to be taxed by the said order the taxing master do include in the costs of the defendants, the said Sir Henry Seymour King, Charles William Trotter, and Joseph Myers Richardson, a full set of costs except as regards any separate costs of the defendant company:

And it is ordered that the costs of the defendants, the said Sir Henry Seymour King, Charles William Trotter, and Joseph Myers Richardson, and of the plaintiffs, of this motion be also taxed by the taxing master and be included in the certificate of taxation to be made under the said order dated the 29th of June, 1900:

And it is ordered that the said costs be paid in like manner as the costs directed by the said order were directed to be paid.

Solicitors: *F. Stuttaford; Baker, Blaker & Hawes.*

H. B. H.

## *In re* WALKER AND OAKSHOTT'S CONTRACT.

KEKEWICH J.

1901

June 20.

[1901 W. 1391.]

*Vendor and Purchaser—Title—Trust for Sale—Leaseholds—Sale by way of Underlease — Vendor's Summons — Rescission of Contract — Return of Deposit—Jurisdiction—Vendor and Purchaser Act*, 1874 (37 & 38 *Vict.* c. 78), *s.* 9.

Trustees for sale put up for sale by auction in lots leasehold property comprised in a single lease (of which they were the assignees) subject to a condition that in the event of the lots being sold to different purchasers (which happened) the sale of each lot should be by way of underlease for the whole of the term, less one day, at an apportioned rent :—

*Held*, not a valid exercise of the trust for sale.

The Court has jurisdiction upon a vendor's summons under the Vendor and Purchaser Act, 1874, to make an order for rescission of the contract and return of the deposit.

So *held* on the authority of *In re Higgins and Percival*, (1888) 59 L. T. 213.

VENDOR'S SUMMONS under the Vendor and Purchaser Act, 1874.

On August 13, 1900, the applicants put up for sale by auction certain freehold and leasehold property, known as the Tanyfoel estate, Penmaenmawr.

The third condition of the special conditions of sale provided that the title to lots 11, 12, and 13 should commence with a lease dated December 26, 1866, to Murray Gladstone, Esq., through whom the vendors claimed.

The ninth condition provided that, if these three lots were not sold to the same purchaser, the sale of each one of such lots (or any two of them, if two were sold to the same purchaser) should be carried out by the vendors granting to each purchaser an underlease of such one or two of these three lots as were purchased by him, for the residue of the term granted by the said lease except the last day thereof, at the apportioned ground rent or total of the two apportioned ground rents stated in the particulars of sale for each such lot or for such two lots, as the case might be.

The vendors were entitled to the Tanyfoel estate as trustees

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for sale under a marriage settlement dated September 14, 1883, and a conveyance dated October 11, 1890. The settlement also conferred upon them a power of leasing for twenty-one years.

The respondent was declared the purchaser of lots 12 and 13 (lot 11 having been sold to some one else), and it was proposed that he should take an underlease of the property in accordance with condition 9.

The conditions of sale did not disclose the fact that the vendors were trustees, and this fact was not known to the purchaser until after the delivery of the abstract of title.

By his third requisition the purchaser objected that the proposed underlease was not a proper exercise of the trust for sale in the settlement, and that the sale ought to be by way of assignment, and he cited *Evans* v. *Jackson* (1) in support of this objection.

The vendors in reply submitted that they had adopted the proper course in the arrangements made by the conditions, and they declined to assign any part of the property in the lease alone. They, however, did not object to give the purchaser an assignment of all the property in the lease for the whole term subject to the underlease to be granted to the purchaser of lot 11.

The vendors now took out this summons for a declaration that the third requisition had been sufficiently answered.

*Warrington, K.C.*, and *Church*, for the vendors. Looking at the substance of this transaction, it is not a lease but a sale. Where leasehold property held under one lease is sold in lots it is a common conveyancer's device to sell by underlease for the purpose of avoiding an apportionment of the rent reserved by the original lease: *In re Webb.* (2)

*Evans* v. *Jackson* (1), on which the purchaser founds his objection, is distinguishable, because there the trustees were not purporting to sell at all.

*P. O. Lawrence, K.C.*, and *Buckmaster*, for the purchaser. This is not a valid exercise of the trust for sale, because it is an underlease and not a sale.

(1) (1836) 8 Sim. 217; 42 R. R. 163. (2) [1897] 1 Ch. 144.

The distinction is one of substance, because the trustees, being not the original lessees but assignees, get rid of all liability under the covenants of the lease if they assign, whereas their liability remains if they grant an underlease, and they would be entitled to an indemnity out of the trust estate in respect of that liability.

The purchaser's case is strengthened by the fact that the settlement under which the trustees are entitled contains a very limited power of leasing.

This case falls within *Evans* v. *Jackson.* (1)

The purchaser will not get a good title unless he gets an assignment. That being so, we ask for an order rescinding the contract, and for a return of the deposit with interest and costs. That this may be done on a vendor's summons is shewn by *In re Higgins and Percival.* (2)

*Warrington, K.C.*, in reply.

KEKEWICH J. It does not lie within the ambit of a judge's purely judicial duties to express any regret that the law is as he finds it and is bound to administer it; and, therefore, I suppose that I ought not to regret that I am bound to admit the objection of the purchaser in this case. The vendors are trustees with an ordinary power of sale, they are selling leasehold property, the lease comprising more than one tenement, and they adopted under advice that which is considered by conveyancers, and found to be in practice, the best means of selling property under those circumstances. As Mr. Warrington pointed out, there is another mode of doing it, which has some inconveniences and is certainly not so simple, but yet would obviate the objection to be presently noticed, namely, that of assigning the lease to one purchaser, and obliging him to grant sub-demises to other purchasers at apportioned rents. The trustees have adopted, as I say, that which experience has proved to be the best mode of carrying out the sale—that is, they have inserted a condition that each purchaser shall take a sub-demise of the house purchased by him for the whole term, less one day, at an apportioned rent. The objection

(1) 8 Sim. 217; 42 R. R. 163. (2) 59 L. T. 213.

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taken is that this is a power of sale and not a power of leasing, and that consequently that cannot be done. On the part of the purchaser my attention is called to the fact that the same instrument which contains the power of sale also contains a power of leasing, and I am asked to infer from that that such a lease as this was not contemplated, and that for that reason it does not come within the power of sale. I am not impressed by that argument. I think my duty is to consider the power of sale as it stands, and to see whether this is a sale or not. For many purposes it is a sale. The point is dealt with by Stirling J. in the case of *In re Webb*. (1) There the question was one of taxation, and the learned judge had to consider whether costs should not be charged according to the scale which applies to conveyances, and he says: "Now, the first question is, Can this transaction be treated as a conveyance within the meaning of Part II. of Sched. I.? I answer, No, because it is not a conveyance in fee or for any other freehold estate. Then, is it a lease? In a sense, no doubt, it is a lease, but in truth it is a sale. It is described as a sale in the conditions of sale, and it is so described in the plaintiffs' bill of costs. It is a sale carried out by an underlease, which is a well-known conveyancer's expedient, where the property sold is held with other property under one lease, to avoid an apportionment of the rent, about which there might be a difficulty with the superior landlord." That, of course, is not the whole difficulty; but still it is one point decided by Stirling J. It is a sale; and in that sense it is a sale and not a lease if you distinguish one against the other. Nevertheless it is a lease in form, and unfortunately, in one respect at least, it is a lease in substance.

The head lease was not granted to these trustees. It was granted to some person through whom they claim. The result is that, by assigning that lease, they get rid of all liability under the covenants. There is no privity of contract, and the privity of estate is got rid of by assignment. If they do not assign they will not get rid of their liability. They will sub-demise to each purchaser; they will take from each purchaser a covenant

(1) [1897] 1 Ch. 144, 149.

to observe the covenants in the head lease as regards the particular property which has been purchased by him, and they will take also a covenant to pay an apportioned rent, but they will remain liable as assignees for the payment of those rents by virtue of the privity of estate which exists in them under the assignment to them of the head lease. It seems to me that that is a fatal objection, and to my mind it is the only objection to their selling in this manner. I hold it to be a sale carried out by means of a sub-lease, and, therefore, I cannot thoroughly and properly describe it as a sale and not a lease, nor can I conceive it to be a sale within the contemplation of the trustees' ordinary power of sale. It does not get rid out and out of the property; it does not get rid out and out of the liability which attaches to these trustees as assigns of the lease, and I do not think that they ought to keep themselves liable to the rents and covenants under the head lease, as regards which they have, of course, a right of indemnity against the estate. On that ground I regret to be obliged to uphold the objection of the purchaser. From that point of view *Evans* v. *Jackson* (1) has no application. What the Vice-Chancellor there held was that an express trust that the executor should sell a house was inconsistent with granting a lease. That does not touch the point with which I have to deal. Then, what is to be done? Of course the purchaser's objection is allowed with the usual consequences. But he says, "That being so, I cannot go on. This puts an end to the contract, and I ask the Court to make an order rescinding the contract, and for the return of the deposit with interest and the costs of investigating the title." Mr. Warrington says that cannot be done on a vendor's summons. Mr. Lawrence has referred me to the case of *In re Higgins and Percival* (2), which is reported only in the *Law Times*, in which Kay J. considered this question. That was a vendor's summons, and the purchaser was held entitled to have the contract rescinded and to a return of the deposit, together with interest and costs. Kay J. went into the matter and referred to authorities, and came to the conclusion that he had that jurisdiction under the Vendor and Purchaser Act under

(1) 8 Sim. 217; 42 R. R. 163. (2) 59 L. T. 213.

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the general words which enable the Court to make whatever order it considers just. I shall of course follow that decision, as it seems right that that should be done, and I make the same order as in that case.

Solicitors: *Walker & Pettitt; Hugh C. Godfray, for Oakshott, Baxter & Chevalier, Liverpool.*

H. B. H.

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COZENS-HARDY J. 1901 May 7, 8, 17.

## MEARS *v.* CALLENDER.

[1901 M. 903.]

*Landlord and Tenant—Removable Fixtures—Glass-houses—Right to remove Fruit Trees—Compensation—Agricultural Holdings (England) Act*, 1883 (46 & 47 *Vict. c.* 61), *ss.* 1, 3, 34, 54, 55, 60—*Market Gardeners' Compensation Act*, 1895 (58 & 59 *Vict. c.* 27), *s.* 4.

A landlord in 1887 demised a farm to defendant for a term expiring in 1901. The lease provided (clause 13) that in the last year the landlord might enter and sow certain seeds, and that the tenant should also leave gratis for the landlord "all the roots remaining unconsumed in the ground, and also all improvements made by the tenant, and all cultivations, dressings, and manures, in consideration of no claim being made by the landlord for similar matters on the tenant now entering"; and (clause 14) that the tenant might, at his own cost, convert into an orchard so much of certain meadow land as he thought proper; and (clause 21) that the Agricultural Holdings (England) Act, 1883, should not apply to the contract of tenancy. Shortly after the tenancy commenced defendant turned part of the meadow land into an orchard in which in 1901 were over 1200 trees (apple, pear, plum, and cherry) in good bearing condition, and, though not capable of removal, worth some hundreds of pounds to an incoming tenant. Defendant also erected ten glass-houses. One had concrete sides, and its glass span-roof substantially rested on the sides and could be removed without damaging the walls. In the case of the other houses the glass span-roofs were supported by and nailed to wide sills which in turn were nailed to and supported by wooden piles driven into the ground. In these houses defendant grew grapes, peaches, nectarines, tomatoes, and strawberries, which he sold in Reading and Covent Garden, carrying on the trade of a market-gardener with his landlord's knowledge:—

*Held*—

(1.) That at common law defendant could not cut down or remove the orchard trees.

(2.) (Following *Penton* v. *Robart*, (1801) 2 East, 88; 6 R. R. 376, notwithstanding the criticism of it in *Elwes* v. *Maw*, (1802) 3 East, 38;

6 R. R. 523), that at common law the defendant could lawfully remove the glass-houses unless precluded by clause 13 of the lease.

(3.) That clause 13 did not preclude him, as on the construction of it "improvements" did not include glass-houses.

(4.) (Following *Smith* v. *Callander*, [1901] A. C. 297, as to the meaning of the similarly worded s. 4 of the Market Gardeners' Compensation (Scotland) Act, 1897), that s. 4 of the Market Gardeners' Compensation Act, 1895, only applied to improvements made after January 1, 1896, and did not assist defendant.

(5.) That as the glass-houses were erected without the landlord's written consent required by s. 3 of the Act of 1883, defendant was precluded from obtaining compensation for them.

(6.) That the common law right of defendant to remove the glass-houses was left untouched by the Act of 1883, s. 34 of which was lawfully excluded by clause 21 of the lease.

(7.) That as the orchard was planted with the landlord's consent in writing, which was held to be given by the lease, defendant was entitled to compensation for the trees under ss. 1 and 3 of the Act of 1883, there being nothing in clause 13 of the lease to exclude him from compensation.

(8.) That if clause 13 must be construed as excluding defendant from statutory compensation, the attempted exclusion was inoperative by reason of s. 55 of the Act of 1883.

The defendant was therefore held to be entitled (*a*) to compensation for the trees, (*b*) to remove the glass-houses.

THIS was an action, without pleadings, in which the plaintiff, Charlotte Mears, widow, claimed an injunction to restrain the defendant, Frank Callender, his servants and agents, from pulling, or cutting down, or otherwise removing or damaging the glass-houses or greenhouses, or other erections, or the fruit and other trees standing and growing upon the farms and lands called Kingwood Farm, in the parishes of Rotherfield, Peppard, and Shiplake, Oxfordshire, demised to the defendant by a lease dated August 17, 1887, and damages for the injury caused to the plaintiff's reversion by the pulling and cutting down by the defendant of certain glass-houses and fruit trees recently standing and growing on the said farm.

The following statement of facts is taken from the judgment of Cozens-Hardy J. at the trial of the action :—

About twenty years ago Mr. Joseph Mears bought of Mr. Wiltshire a farm called Kingwood Farm, in Oxfordshire. It was a purely agricultural holding. For some few years he occupied the farm, but on August 17, 1887, he granted a lease

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of it to the defendant for seven, fourteen, or twenty-one years, from Michaelmas, 1887, at the yearly rent of 165*l.* The lease contained the usual covenants applicable to a small farm and farmhouse, but it is necessary to call attention to the following provisions, which are not in common form: "(10.) Subject to clause 14, the tenant shall not break up or convert into tillage any meadow or pasture land without the landlord's written consent, and if he shall do so he shall, during the remainder of the tenancy, pay the additional yearly rent of 50*l.* for every acre of land which shall be so broken up or converted into tillage, and so in proportion for any less quantity than an acre, such additional rent to be payable half-yearly on the days aforesaid, and to be recoverable by distress or otherwise as rent hereby reserved, and generally the tenant shall manage and cultivate the farm in a husbandlike and in the best manner, so as not to impoverish any part thereof, and shall leave the same at the end of the tenancy in good heart and condition. (11.) If the landlord shall at any time during the said term, by agreement with the tenant, expend any money in draining, building, or other permanent improvements on the said premises, the tenant shall during the said term pay to the landlord interest on the sum expended after the rate of 5*l.* per cent. per annum, such interest to be considered as additional rent, and to be recoverable as such by distress or otherwise. (12.) The tenant shall not in the last year of the tenancy prepare and sow with a white corn crop more than one-half part of the arable land. (13.) In the last year of the tenancy the landlord or his incoming tenant shall be at liberty to enter upon the lands for a wheat season so soon as the crop for that year is cleared off, in order to prepare the same for such season, and may also sow seeds among the Lent or summer corn, which the tenant shall harrow in; and the tenant shall also leave gratis for the landlord or his incoming tenant all the roots remaining unconsumed in the ground, and also all improvements made by the tenant, and all cultivations, dressings, and manures, in consideration of no claim being made by the landlord for similar matters on the tenant now entering. (14.) The tenant may at any time during the said term, at his own cost, extend the present

kitchen garden, part of the said premises, eastwards across the full extent of the pasture field surrounding the said house by a line at right angles with the present kitchen-garden wall, and also at the like cost convert into an orchard so much of the meadow land surrounding the said house as he may think proper. (21.) The Agricultural Holdings (England) Act, 1883, shall not apply to the contract of tenancy."

Shortly after the lease the defendant converted part of the meadow surrounding the house into an orchard. There are now upwards of 1200 trees in the orchard—apples, pears, plums, and cherries—in good bearing condition. These trees, though not capable of removal, are worth several hundred pounds to any one taking the farm. The defendant also erected ten glass-houses, in which grapes, peaches, nectarines, tomatoes, and strawberries were grown. From these houses he supplied fruit to Reading and also to Covent Garden, and I think it is clear that he carried on the trade of a market-gardener on the premises with considerable success, and with the full knowledge of his landlord.

The defendant gave notice to quit the farm at Michaelmas, 1901, and he claimed the right to remove the houses and to have compensation for the orchard trees. He pulled down three houses before action brought, but the plaintiff's allegation that the defendant threatened to cut down or remove the orchard trees is not proved. There is some conflict of evidence as to the structure of the glass-houses. Upon the whole I conclude that as to one of the houses, which has concrete sides and was erected in or shortly after 1893, the glass span-roof is not attached in such a way as to constitute it part of the freehold. I think it substantially rests by its own weight upon the concrete wall, and that it could be lifted up and removed without in any way pulling to pieces or damaging the walls. As to the other houses, wooden piles were driven into the ground, on the top of which wide sills were placed which supported the glass span-roofs, except in the case of the vinery, where there was a lean-to roof. The roofs were nailed to the sills or backings, which in turn were nailed to the posts.

The question raised in the action was whether the plaintiff,

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who was the present reversioner, could take the benefit of the orchard trees and of the remaining houses without making any compensation or payment for the same.

The action was tried on May 7 and 8, 1901.

*Eve, K.C.*, and *J. G. Wood*, for the plaintiff. By clause 13 of the lease the tenant expressly contracts to leave all improvements, and on the construction of the lease alone he is bound to leave the orchard and the glass-houses without claiming compensation. The lease is framed on the footing that as the tenant went into possession without a valuation, he must go without one. The Agricultural Holdings (England) Act, 1883, is expressly excluded by clause 21 of the lease.

The lease is a farming lease, and the covenants in it relate to the agricultural use of the land. The orchard was planted in pursuance of the terms of the lease, but there was no separate written consent to this being done, and there was no consent at all, either by the lease or otherwise, to the erection of the glass-houses.

Sect. 3 of the Act of 1883 says that compensation is not to be payable where there is no previous consent in writing, so far as concerns any improvement mentioned in the first part of the First Schedule, and both the erection of buildings and the planting of orchards are there mentioned as improvements.

Sect. 34 of the Act of 1883 deals only with the tenant's right to remove fixtures and buildings; it does not deal with compensation, and, assuming that the present case is within the words of s. 34, there is nothing in s. 55 which prevents the operation of the Act being excluded by express agreement, except so far as the tenant's right to compensation is concerned. Therefore, the Act does not assist the defendant as regards compensation, and its provisions as to the right of removal being expressly and lawfully excluded, the case must be governed by the common law.

The Market Gardeners' Compensation Act, 1895, has no application to the case.

Apart from the Acts of 1883 and 1895, the houses are not tenant's or trade fixtures, and the defendant has no case as to

the trees. There is no right to remove them, for they form part of the soil. It is different in the case of a nurseryman and his young trees grown to be sold from time to time, but the law does not apply in the case of trees in an ordinary orchard.

As to the houses, because it is necessary to take a thing to pieces before it can be removed, that does not make it less a chattel; but that is a different case from one in which the thing has to be grubbed up and dug out of the land besides being submitted to a process equivalent to reducing a building to its original individual bricks.

As between landlord and tenant, Kindersley V.-C. held that brick buildings, with brick foundations let into the soil, although erected for the sole purposes of trade, could not be removed by the tenant: *Whitehead* v. *Bennett*. (1) The law as there laid down was approved by Lord Selborne L.C. in *Wake* v. *Hall* (2), which was affirmed by the House of Lords. (3)

These buildings are not even in the nature of trade fixtures. Things which cannot be taken away without being reduced to their original elements cannot be trade fixtures. If these houses can be removed, why could not the beast-house in *Elwes* v. *Maw* (4) be removed?

[COZENS-HARDY J. referred to *Fitzherbert* v. *Shaw* (5) and *Penton* v. *Robart*. (6)]

In *Elwes* v. *Maw* (7) Lord Ellenborough disapproved of what Lord Kenyon said as to greenhouses in *Penton* v. *Robart*. (6)

*Vernon Smith, K.C.*, and *Peterson*, for the defendant. As to the trees, the defendant has not threatened to remove them, and only asks for compensation in respect of them under the Act of 1883. The planting of orchards is within Part I. of the First Schedule to that Act, and as the trees were planted with the written consent of the landlord, under the provisions of the agreement, the tenant is entitled to compensation under ss. 1 and 3. Sect. 55 avoids any agreement by a tenant

(1) (1858) 27 L. J. (Ch.) 474.
(2) (1880) 7 Q. B. D. 295, 301.
(3) (1883) 8 App. Cas. 195.
(4) 3 East, 38; 2 Sm. L. C. 7th ed. p. 162; 6 R. R. 523.
(5) (1789) 1 H. Bl. 258.
(6) 2 East, 88; 6 R. R. 376.
(7) 3 East, 38, 56; 6 R. R. 523.

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depriving him of the right to compensation in respect of the things mentioned in the First Schedule.

If the tenant is not entitled to compensation under the Act of 1883, in respect of the glass-houses, he is entitled to remove them under s. 34.

If that Act does not apply, the tenant is entitled to remove the houses under the general law as to fixtures. Sect. 60 of the Act preserves the rights of the tenant under the previously existing law where there is no express provision in the Act.

A windmill made of wood and resting by its own weight on a brick foundation was held not to be parcel of the freehold: *Rex* v. *Otley* (*Inhabitants*). (1) And a wooden barn resting in a similar way was held to be removable by the tenant: *Wansbrough* v. *Maton*. (2) These cases are a sufficient authority for saying that glass-houses placed on concrete are not fixtures, but may be removed, and none the less so because they must first be taken to pieces. But if the houses are fixtures, they are only trade fixtures and may therefore be removed. *Penton* v. *Robart* (3) is in our favour on this point, and what Lord Ellenborough said about that case only amounts to an expression of opinion that it lays down the law too generally. In *Dean* v. *Allalley* (4) sheds called Dutch barns were held to be removable. The observations of Lord Blackburn in *Wake* v. *Hall* (5) are also in our favour.

If the Act of 1883, standing alone, does not apply, it applies as it is altered by the Market Gardeners' Compensation Act, 1895. By s. 4 of that Act, where, under a tenancy current at the commencement of the Act (January 1, 1896), a holding is then in use or cultivation as a market garden with the landlord's knowledge, and the tenant has executed thereon, without notice of the landlord's dissent, any improvement in respect of which a right of compensation or removal is given to a tenant by the Act, then the Act is to apply as if it had been agreed in writing after the commencement of the Act that the holding was to

(1) (1830) 1 B. & Ad. 161; 35 R. R. 258.
(2) (1836) 4 Ad. & E. 884; 43 R. R. 510.
(3) 2 East, 88; 6 R. R. 376.
(4) (1799) 3 Esp. 11.
(5) 8 App. Cas. 195, 204.

be treated as a market garden. And by s. 3 the effect of the agreement referred to is to extend s. 34 of the Act of 1883 to fixtures, buildings, and other things to which it did not originally apply.

Sect. 34 of the Market Gardeners' Compensation (Scotland) Act, 1897, which is in almost the same terms as s. 4 of the English Act of 1895, has been interpreted by the Court of Session in *Callander* v. *Smith*. (1)

[They also referred to *Buckland* v. *Butterfield* (2); *Rex* v. *St. Dunstan's, Kent* (*Inhabitants*). (3)]

*Eve, K.C.*, in reply, referred to *West* v. *Blakeway*. (4)

*Cur. adv. vult.*

May 17. COZENS-HARDY J., after stating the facts and the question to be determined, proceeded as follows:—Under these circumstances questions of importance and difficulty arise for my determination. It is contended on the part of the plaintiff that the defendant is bound to leave the orchard and all the houses without claiming compensation. On the other hand, the defendant claims, both at common law and under the Agricultural Holdings (England) Act, 1883, as enlarged by the Market Gardeners' Compensation Act, 1895, to be entitled to remove or to have compensation for all the glass-houses, and he claims under those Acts or one of them to be entitled to compensation for the fruit trees.

It will be convenient to consider—first, what are the rights of the parties irrespective of the Acts of 1883 and 1895, and next, to what extent their rights are modified or affected by those Acts. Now at common law it is plain that the defendant could not cut down or remove the orchard trees or claim compensation. But, as to the glass-houses, a much more difficult question arises. If erected for the mere purpose of pleasure and ornament, and not for the purpose of a trade, they would not be removable: *Buckland* v. *Butterfield* (2); *Jenkins*

(1) (1900) 2 F. 1140; affirmed by the House of Lords as *Smith* v. *Callander*, W. N. (1901) 102; now reported [1901] A. C. 297.

(2) (1820) 2 Brod. & B. 54; 22 R. R. 649.

(3) (1825) 4 B. & C. 686.

(4) (1841) 2 Man. & G. 729.

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v. *Gething*. (1) If, however, they were erected, as in the present case, by a market-gardener for the purposes of his trade, different considerations arise. In *Penton* v. *Robart* (2), Lord Kenyon intimated a strong opinion in favour of the tenant: "The old cases upon this subject leant to consider as realty whatever was annexed to the freehold by the occupier; but in modern times the leaning has always been the other way in favour of the tenant, in support of the interests of trade which is become the pillar of the State. What tenant will lay out his money in costly improvements of the land, if he must leave everything behind him which can be said to be annexed to it. Shall it be said that the great gardeners and nurserymen in the neighbourhood of this metropolis, who expend thousands of pounds in the erection of green-houses and hothouses, &c., are obliged to leave all these things upon the premises, when it is notorious that they are even permitted to remove trees, or such as are likely to become such, by the thousand, in the necessary course of their trade. If it were otherwise, the very object of their holding would be defeated. This is a description of property divided from the realty." On the other hand, Lord Ellenborough, in the leading case of *Elwes* v. *Maw* (3), did not approve of Lord Kenyon's observations, at least in so far as they might be taken to apply to agriculture: "He"—i.e., Lord Kenyon—"certainly seems, however, to have thought that buildings erected by tenants for the purposes of farming, were, or, rather *ought to be*, governed by the same rules which had been so long judicially holden to apply in the case of buildings for the purposes of trade. But the case of buildings for trade has been always *put and recognised as a known, allowed, exception* from the general rule, which obtains as to other buildings." I am not satisfied that Lord Ellenborough dissented from Lord Kenyon's view, so far as market-gardeners were concerned. If, however, there be any difference between Lord Kenyon and Lord Ellenborough, I prefer the view that glass-houses erected by a nurseryman for the purpose of carrying on his trade may be removed. The

(1) (1862) 2 J. & H. 520. (2) 2 East, 88, 90; 6 R. R. 376.
(3) 3 East, 38, 57; 6 R. R. 523.

dicta of Lord Bramwell in *Wake* v. *Hall* (1) support this view. Moreover, the whole tendency of the Courts in recent years has been to enlarge the rights of tenants in respect of fixtures. Nor do I consider that there is anything in the judgment of Kindersley V.-C. in *Whitehead* v. *Bennett* (2) which ought to lead me to a contrary conclusion. Unless, therefore, the defendant is precluded by some covenant in the lease, I think he is entitled to remove the glass-houses. But it is contended that by clause 13 the defendant is bound to leave all the houses without claiming any compensation from the plaintiff, these houses being "improvements" made by the tenant within the meaning of clause 13. Upon the whole, I do not think this contention can prevail. I think clause 13 only applies to "similar matters" to those in respect of which the landlord made no claim when the defendant entered—in other words, to the tillages, &c., in respect of which, according to the custom of the country, payment would otherwise have to be made to an outgoing tenant of an agricultural holding. I cannot read them as applying to extensive houses of the nature of trade fixtures erected by a market-gardener on the property.

The next question is as to the effect of the Acts of 1883 and 1895. Now, the Act of 1883 divides improvements into three classes—(1.) those to which the consent of the landlord is required; (2.) those in respect of which notice to the landlord is required; and (3.) those which require neither consent nor notice. By s. 3 compensation under the Act is not payable in respect of improvements of the first class, unless the landlord has previously consented in writing to such improvements, and any such consent may be given by the landlord unconditionally or upon such terms as to compensation or otherwise as may be agreed upon between the landlord and the tenant, and in the event of any agreement being made between the landlord and the tenant any compensation payable thereunder shall be deemed to be substituted for compensation under this Act. The improvements of the first class include planting of orchards or fruit bushes and erection or enlargement of buildings. By s. 34, where after the commencement of the Act a tenant

(1) 8 App. Cas. 210. (2) 27 L. J. (Ch.) 474.

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affixes to his holding any engine, machinery, fencing, or other fixture, or erects any building for which he is not under this Act or otherwise entitled to compensation, then such fixture or building shall be the property of, and be removable by, the tenant before or within a reasonable time after the termination of the tenancy. There are provisions to which I need not refer in detail, by virtue of which the tenant removing must make good all damage and give the landlord one month's notice, so as to enable the landlord to elect to purchase. By s. 54 the Act applies to a holding such as the defendant's. By s. 55 any contract, agreement, or covenant made by a tenant by virtue of which he is deprived of his right to claim compensation under this Act in respect of any improvement mentioned in the first schedule hereto (except an agreement providing such compensation as is by this Act permitted to be substituted for compensation under this Act) shall, so far as it deprives him of such right, be void both at law and in equity. By s. 60, what I may call the common law rights of the tenant are preserved. I am relieved from the necessity of considering the effect of s. 4 of the Act of 1895, which confers certain benefits upon market-gardeners holding under a *current* tenancy. For since this case was argued before me, it has been held by the House of Lords in *Smith* v. *Callander* (1) that under a precisely similar section in the Market Gardeners' Compensation (Scotland) Act, 1897, no right to compensation is given except in respect of improvements made *after* the Act. The consequence is that I must put aside the Act of 1895, and consider only the Act of 1883. Now as to the glass-houses, the written consent of the landlord was not obtained, and the Act does not help the plaintiff. The attempt in the lease to exclude the Act of 1883 succeeds as to s. 34, which is not hit by s. 55. But the landlord's consent in writing to planting the orchard was given by the lease, and there is nothing in clause 13 which sufficed to deprive him of his statutory right to compensation. If, however, my view of the true construction of clause 13 is not correct, then it seems to me that s. 55 of the Act of 1883 applies, and that the contract by which, on that hypothesis, he

(1) W. N. (1901) 102; now reported [1901] A. C. 297.

is said to be deprived of his right to claim compensation is void both at law and in equity. A landlord cannot impose as a condition of his consent the term that no compensation shall be paid. The Act prohibits this. The result is that, in my opinion, the plaintiff fails in her contentions, and the action must be dismissed with costs.

Solicitors for plaintiff: *Coode, Kingdon & Cotton.*
Solicitors for defendant: *Drake, Son & Parton.*

F. E.

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## *In re* RICHARDS. LAWSON *v.* HARVEY.

[1898 R. 14.]

*Administration—Corporate Creditor—Grant of Administration to Officer—Retainer.*

Letters of administration were granted to a person described as manager of a bank; he was himself not a creditor:—

*Held*, that he could not as administrator retain the amount of a debt due to the bank.

THIS was the further consideration of a creditor's action to administer the estate of Thomas Grasbrook Richards, who died intestate and insolvent on March 5, 1895.

On April 10, 1896, letters of administration of the personal estate of the intestate were granted to "John Francis Harvey, manager of the Trades Commercial Bank, Limited, creditors of the said intestate."

The only defendant was the administrator. He was not a creditor in his own right. A common order for accounts and inquiries was made on February 7, 1898. At that date the defendant had not paid or appropriated any money come to his hands as administrator towards satisfaction of the debt due to the bank.

By his certificate, dated July 31, 1899, the master found that the defendant had in his hands a balance of 1011*l.* 14*s.* 6*d.* for which he was accountable, and reserved a claim by the

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defendant to deduct 242*l.* 10*s.* 6*d.*, the amount of the debt due to the bank, in the following words: "The defendant claims that he is entitled to retain or pay out of the said 1011*l.* 14*s.* 6*d.* the debt No. 16 in the first schedule hereto due to the Trades Commercial Bank, Limited, the grant of letters of administration to the intestate's estate having been made to the defendant as manager of the said bank, creditors of the said intestate."

The only question on further consideration was whether that claim could be substantiated.

*Dunham*, for the defendant. The grant of administration was made to the defendant simply because the bank could not itself take the necessary oath and obtain the grant; it was made to the defendant as the officer of and for the benefit of the bank. This position is analogous to that of an administration durante minoritate, or to the use of a lunatic; in the one case the amount of a debt due to the minor, in the other the amount of a debt due to the lunatic, could be retained by the administrator: *Franks* v. *Cooper* (1); *Talbot* v. *Frere.* (2)

*Rowland Rowlands*, for the plaintiff, and *A. J. Chitty*, for another creditor, were not called on.

COZENS-HARDY J. I think this claim cannot be maintained. The case is peculiar, for letters of administration were granted to the manager of a bank who were creditors, and although in this grant the administrator is described as the manager of the bank, the grant was not expressed to be made for the use of the bank: it was made to him as an individual; he would not have ceased to be administrator if he had ceased to be manager. I assume that it would have been open to him before decree to prefer the bank to the other creditors; he did not do that. An administration decree has been made; the bank carried in a claim which has been allowed by the master's certificate as ranking for dividend only, subject to a claim to retain, as it is put, being left open.

The right, if any, is not to retain, but to prefer; and on the making of the decree the right to prefer was gone, though

(1) (1799) 4 Ves. 763. (2) (1878) 9 Ch. D. 568.

a right to retain would have remained. The administrator here is not himself a creditor; the case is not like one where a grant has been made to a person durante minore ætate of an infant, or to the use of a lunatic. The claim will be disallowed.

Solicitors for creditors: *Spencer Chapman & Co., for J. R. Richards, Swansea.*

Solicitor for claimant: *J. T. Lewis, for Aeron Thomas & Co., Swansea.*

D. P.

## HANBURY *v.* JENKINS.



[1900 H. 2331.]

*Several Fishery—Crown Grant—Non-tidal, Non-navigable, Waters—Ownership of Soil—Presumption—Weirs—Adverse Acts of Ownership—Right of Way—Incorporeal Hereditament—Incorporeal Right.*

A several fishery may exist either apart from or as incident to the ownership of the soil over which the river flows; but where a several fishery is proved to exist, the owner of the fishery is to be presumed, in the absence of evidence to the contrary, to be the owner of the soil, whether it is a navigable river or a river neither public nor navigable. The use of the word "several" or "separalis piscaria" is not necessary to create a several fishery.

The grant of "weirs" is a grant, not of a mere right of fishing, but of a corporeal hereditament consisting not only of the soil on which any particular weir is constructed, but of the soil over which the river runs, and upon which there is the right to construct weirs for the purpose of taking fish. A grant purporting to give a definite length of several fishery may still be a good grant of a several fishery in part of the river so included, though as to other part of it the Crown, at the time, had no several fishery to give.

Construction to be placed on apparently adverse acts of ownership discussed.

*Semble*, an incorporeal right of way along both banks of a river may be appendant to an incorporeal right of fishing, the one being capable of union with the other without any incongruity.

Co. Litt. 121 b considered and explained, and note (7) (Hargrave and Butler's edition) on this point adopted.

ACTION.

The plaintiff, John Capel Hanbury, claimed the right to a several fishery over some twelve miles of the river Usk, together

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with a right of way along both banks of the river for angling purposes.

Under the will of his father, Capel Hanbury Leigh, who died in September, 1861, the plaintiff was tenant for life of certain real estates which he alleged included the bed, or, alternatively, the several fishery, in all that fishing water or rivulet of Usk and Caerleon, in the county of Monmouth, and all pools upon the said rivulet or river, commencing at a large stone in the middle of the said river called Maen-y-Wrath, the boundary between the parishes of Trostry and Kemmos Commander, three miles and one furlong above Usk Bridge, and running down the said river through the hamlet of Monkswood and the parishes of Usk, Llanbador, Llanhowell, Llangibby, Llantrisant, Tredanor, and Kemmos Inferior, and terminating at a red post at the lower end of Redland Pool, being twelve miles and one furlong in length or thereabouts, together with all and singular profits, commodities, advantages, emoluments, and appurtenances whatsoever to the said fishing, water, or rivulet, belonging or appertaining and including a right of way along both banks of the said river, within the same limits, for the purpose of angling and fishing, and otherwise using and enjoying the said fishing. The plaintiff and his predecessors in title claimed to have enjoyed this right of way from time immemorial, and also for the respective periods of twenty years and forty years without interruption before the alleged wrongful acts of the defendant, the subject of this action.

The defendant John Jenkins was the owner in fee and occupier of certain lands known as Pont Sandpit, situate on the left bank of the said river, about one mile below Usk Bridge, with a frontage of some 700 yards to the river; and he claimed a moiety of the bed of the river where it adjoined his lands, and, in virtue of this ownership, a right to angle and fish therein from off his own land, and, as he also claimed the right to stop, and had endeavoured to stop, certain persons claiming to be licensees of the plaintiff from trespassing on his lands whilst fishing in the river, the present action was commenced in July, 1900, claiming (1.) a declaration that the plaintiff and his assigns, and all other persons claiming under

the will of the said Capel Hanbury Leigh, were entitled to the bed of the river within the limits above mentioned, and the several fishery therein, and a right of way along the banks of the river for the purpose of angling and fishing and otherwise using and enjoying the said fishery within the limits aforesaid, and (2.) an injunction to restrain the defendant, his tenants, servants, and agents from fishing, or disturbing or attempting to catch fish in, or otherwise trespassing upon, the said river and fishing within the limits aforesaid, or from interfering with, or in any way obstructing or hindering the enjoyment, use, or occupation by the plaintiff, his lessees, licensees, or assigns, of the bed of the said river and the said fishery, within the limits aforesaid.

A great deal of evidence, documentary as well as oral, was adduced with regard to the fishery rights of the plaintiff and others over this portion of the river: the following summary of the plaintiff's documentary title will be sufficient to render the arguments and the judgment intelligible:—

By a lease of September 1, 1516, the King (Henry VIII.) granted to Charles, Earl of Worcester, "Our fishery in our waters of Uske and Seyne in our lordships of Uske and Kaerlion and the members of the same lordships parcel of our Earldom of March, and all our wears in and upon our rivers aforesaid, and in every of them, and all and singular profits of and in the waters or rivers aforesaid, and of and in the wears aforesaid, in anywise arising and accruing and to us in anywise belonging"; also the manor of Wondey and certain demesne lands, for a term of twenty years, at a rent "for the fishery and wears" of 20*l.*, and at certain other rentals for the manor of Wondey and the other demesne lands. On March 12, 1537, another lease of the same fishery, omitting the word "wears," was granted by the King to Henry, Earl of Worcester, for twenty-one years. Subsequent leases, in which the "wears" were mentioned, were granted by the Crown to the Earls and Marquises of Worcester down to 1675, when a lease for ninety-nine years was granted, which was assigned in 1759 to a Capel Hanbury, an ancestor of the plaintiff; from 1759 to 1839 there were a series of leases of the fishery from the Crown to the Hanburys

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or the Leighs, and on March 12, 1839, the Crown granted the fee in the property to the then lessee, one Capel Hanbury Leigh, and the Court, after a careful investigation of the documents, considered that the plaintiff had proved his title to the property and rights, whatever they were, granted to the Earl of Worcester in 1516. The effect of this grant and what passed by it is fully considered and dealt with in the judgment. From 1856 leases had been granted by the plaintiff's predecessors and the plaintiff to trustees for the Usk Fishery Association, and the last lease of May, 1895, was still running in favour of the association. From 1856 the association and its licensees had regularly fished this portion of the river. It also appeared that from 1869 or 1870 there had been a regular and continuous issue of tickets by the association to all the occupiers of land bordering on the river within the limits of the plaintiff's fishery: these tickets were called "brinkers'" tickets, and were licences to fish for trout from land in the occupation of the holder; they were stated to be revocable at any time, and prohibited the holder from fishing for or taking sewin (the Welsh name for sea trout) or sewin pink, i.e., young sewin. Gifts of salmon were also made from time to time by the association to these "brinkers," and to others who assisted the association. The inference in favour of the plaintiff's claim to be drawn from the issue and acceptance of these tickets and the gifts of fish is also considered and dealt with in the judgment.

The claim of the plaintiff or his predecessors to a several fishery, with a right of way along the banks on other parts of this twelve miles, not adjoining the defendant's property, had been the subject of litigation on three previous occasions, and, as the Court considered the result of these actions to be relevant and material on the present issue, they may be shortly stated as follows:—

In 1764 the action of *Gardner* v. *Reece* was tried, in which the plaintiff, an owner or occupier of land adjoining the river, brought an action of trespass against the defendant, a tenant of the fishery, for trespassing on the plaintiff's land and damaging the grass, by dragging his fishing nets, cords, and tackle on to the bank. The defendant pleaded an immemorial

right for the tenants of the fishery to land their nets on the bank of the river, and admitted that he had entered on the plaintiff's land in exercise of his alleged right to go there as tenant of what he called the several fishery. This action was dismissed with costs, the Court finding that the defendant, the tenant, was entitled to go on the plaintiff's land in respect of his several fishery to draw his nets on to the bank.

In 1816 the action of *Davies* v. *Phillips* was tried, in which the plaintiff, as the then tenant of the plaintiff's fishery, brought this action against the defendant Phillips, an occupier of land, for trespassing on the plaintiff's fishery, and recovered damages against the defendant and 227*l.* 4*s.* for costs, the Court finding that the defendant had no right to fish.

In 1857 the action of *Stretton* v. *Phillips* was tried at Gloucester, the plaintiff being the then tenant of the plaintiff's fishery, and he recovered one shilling damages and costs from the defendant for trespass on this fishery.

One of the defences raised was that the plaintiff could not have a several fishery as claimed, because of the existence of at least three other fisheries more or less coextensive with the plaintiff's, namely, the Monkswood and Trostry fisheries on the right and left banks respectively of the river, but above Usk Bridge, and another fishery called the Edlogan, or ninth day fishery, which commenced some way below Usk Bridge, but the limits of which were not very clearly defined, though the Court found as a fact that this last-mentioned fishery and another, called the Priory Fishery, were not over that portion of the river abutting on the defendant's land.

As to the Monkswood Fishery the defendant put in evidence a grant of March 22, 1223, executed by William, the Marshall of England, Earl of Pembroke, to the abbot and monks of Tintern, which granted to them certain lands, "And in the whole water of Usk to fish with divers instruments and nets and to build a moiety of a weir wheresoever they please to choose, and to make the pools and to ordain whatever they shall wish to be for their advantage against the land of the said abbot and monks and within the bounds of the lands woods waters and pastures." It appeared from the evidence that the

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lordships of this fishery merged in the Crown in March, 1461. After the suppression of the monasteries, namely, on March 10, 1537, the King granted to Henry, Earl of Worcester, in tail the possession of Tintern Monastery, and this property eventually passed to the Duke of Beaufort.

The title to the Trostry Fishery, which was now vested in Sir Arthur John Fludyer, Bart., went back at least to 1546. The lease to the association by the plaintiff in 1863 of his fishery rights also contained a reservation in favour of the Duke of Beaufort and Sir Samuel Fludyer, who were there stated to have rights of fishing coextensive and equal with the rights of the lessor from certain points therein particularly mentioned.

The admissibility of this evidence and the effect of it on the plaintiff's claim is dealt with in the judgment.

Another defence was founded on numerous and long-continued adverse acts of ownership exercised by riparian owners, occupiers, and others over the bed of the river, which were inconsistent with the alleged ownership of the soil of the river by the plaintiff. These were—(1.) protecting the river bank by stakes, "gorretting" as it was locally called; (2.) taking gravel and stones from the bed of the river; and (3.) erecting fences in the river opposite the drinking-places for cattle. The result of the evidence as to the nature of these acts was shortly as follows. It appeared that the Usk was a river which rose very rapidly after rain, and came down in heavy flood, washing away on these occasions the banks, unless protected, and depositing large heaps of gravel at turns in the stream or places where there was any obstruction, including islands in the bed of the river, and these heaps of gravel were left high and dry in what was the channel of the river after the floods subsided. In order to protect the banks from erosion by the stream, or to replace it when erosion had taken place, the riparian owners and their tenants drove rows of stakes into the bed of the river, and filled up the space between the stakes and the banks with stones retained by withes worked between the stakes for the purpose of making a number of tiers, rising step above step, so as to prevent the river from eating away the banks: this was locally termed "gorretting." The second class of acts of ownership

consisted of the regular taking by riparian owners, their tenants, and others of gravel and large stones from the bed of the river for road mending, building, and other purposes; these stones and gravel were generally taken from the bed of the river opposite the land of the occupier, but sometimes from any place where it was most easily removed, irrespective of whether it was opposite the land of the person so removing it or not. The third class of acts of ownership relied on consisted of driving stakes into the water some short distance from the edge of the stream, and connecting these stakes with ropes or cross-poles so as to form a kind of pen to keep cattle from straying across the river when they went down to these places to drink.

A great many witness were called and examined on these three classes of acts. The result of this evidence is dealt with in the judgment.

*Neville, K.C., Ingpen, K.C.*, and *P. F. Stokes*, for the plaintiff. The plaintiff is entitled to a several fishery in the river Usk and to a right to walk on the banks for the purpose of fishing. Proof of his ownership of a several fishery raises the presumption that he also owns the bed of the river: *Attorney-General* v. *Emerson* (1); *Hindson* v. *Ashby* (2); *Ecroyd* v. *Coulthard*. (3) The question whether the plaintiff is entitled to the bed of the river is material only on the point whether he has acquired a prescriptive right to the use of the banks for fishing. It is said that there cannot be an easement appurtenant to an incorporeal hereditament; that in order to support a right of way over the banks by prescription, we must shew ownership of the bed of the river: Gale on Easements, 7th ed. pp. 8, 9. But this position is not universally true. A right of way on the bank of the river would be capable of union without incongruity with a right of fishing, in accordance with the tests suggested in Co. Litt. 121 b, note 7.

It is clear that the plaintiff's predecessors in title had the bed of the river; amongst other things the "gurgites" or weirs were granted to them, and weirs are "the very soil itself":

(1) [1891] A. C. 649. (2) [1896] 2 Ch. 1, 10.
(3) [1897] 2 Ch. 554, 570.

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Hale De Jure Maris, Pars Prima, cap. 5, p. 18, Hargrave's Tracts; *Malcomson* v. *O'Dea* (1); *Attorney-General* v. *Emerson* (2); *Neill* v. *Duke of Devonshire*. (3) The use of fixed nets and other acts of user shew that the ownership of the bed of the river has always been in them, and they and the plaintiff have paid the rates on the fishery under the rating Act, 1874.

The plaintiff's title is not impeached by the circumstance that other persons have fishing rights on the part of the river over which his fishery extends, unless their rights are coextensive with his. A partial independent right in another does not derogate from the right of the general owner: *Seymour* v. *Lord Courtenay*. (4)

*Warmington, K.C., H. Terrell, K.C.*, and *A. J. Allen*, for the defendant. The plaintiff's claim is for a several fishery over these twelve miles of river; a "several fishery," separalis piscaria, is "the right of fishing exclusive of all others in a particular place": see *Holford* v. *Bailey*. (5) In 1223 we find a grant to Tintern Monastery of a right of fishing "in the whole water of Usk." The lordship of this fishery came to the Crown in 1461, and in March, 1537, two different rights of fishery are granted by the King, so that at least as regards the Monkswood Fishery, and probably also as to the Trostry Fishery, we shew that other persons had fishery rights coextensive with the plaintiff. The plaintiff therefore fails to prove a several fishery throughout the whole twelve miles of river, and is not entitled to rely on the fact that he may have proved a several fishery over a more limited area, or that the defendant has failed to prove coextensive rights over the whole twelve miles for which a several fishery was originally claimed. In none of the plaintiff's documents is the word "several" mentioned: this is consistent with the defendant's contention that a common right of fishery only was granted to the plaintiff's predecessors, and where concurrent rights of fishing in the same waters, but having an independent origin, are proved, the right of fishing so granted does not include the soil of the river bed, which if

(1) (1863) 10 H. L. C. 593, 619.
(2) [1891] A. C. 649, 656.
(3) (1882) 8 App. Cas. 135.
(4) (1771) 5 Burr. 2815.
(5) (1849) 13 Q. B. 426, 446.

the plaintiff had it might give a right of way along the banks, as appurtenant to a corporeal hereditament; but the right claimed is so burdensome that it must be proved by cogent evidence; there is no presumption in favour of a mere private right. A right of way along the banks is not necessary for a several fishery; at the time these fisheries were granted fishing was done from boats with nets and not with rod and line: an incorporeal hereditament like a right of way cannot be appurtenant to an incorporeal hereditament like a right of fishery: Co. Litt. 121 b; *Edgar* v. *Special Commissioners for English Fisheries*. (1) The fact that fishermen have for many years past made use of the banks for fishing, and have made a path by the side of the river, is not to be taken as evidence of right. This pathway can be attributed to reasonable neighbourly indulgence, as pointed out in *Blount* v. *Layard* (2), *Smith* v. *Andrews* (3), and *Neill* v. *Duke of Devonshire*. (4) The brinkers' tickets and the presents of fish sent to the riparian owners and occupiers may be fairly taken as an acknowledgment of the courtesy shewn to the association by the owners in allowing fishermen to walk over the land. Then, again, the "gorretting" of the river banks, the taking of gravel and stones from the bed of the river and the fencing off of the drinking-places are all inconsistent with the ownership of the soil of the river being vested in the plaintiff. Evidence of these acts of ownership is admissible: it tends to prove "that he who does them is the owner of the soil": *Jones* v. *Williams*. (5) The title to the right of way must stand or fall with the title to the soil of the river: the plaintiff has not made out a title to the soil of the river either by grant or by prescription. The defendant does not claim an exclusive right to fish from his own land, but he does assert that the plaintiff has no right to exclude him from exercising the rights of an ordinary riparian owner.

*Neville, K.C.*, in reply. The plaintiff has proved the grant to his predecessors of a several fishery: that of itself is enough to

(1) (1871) 23 L. T. 732.
(2) (1888) [1891] 2 Ch. 681, n, 691, n.
(3) [1891] 2 Ch. 678, 702.
(4) 8 App. Cas. 156, 170.
(5) (1837) 2 M. & W. 326, 332; 46 R. R. 611.

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carry the soil of the river; but in addition to that we have here a grant of the weirs, which is sufficient to pass the soil of the river: *Neill* v. *Duke of Devonshire*. (1) If plaintiff has the soil of the river, the exercise of adverse acts of ownership by riparian owners will not take away plaintiff's title to the soil. The acceptance of these brinkers' tickets is a direct admission of the plaintiff's exclusive right to fish.

BUCKLEY J. The question I have to determine is whether the plaintiff is entitled to restrain the defendant from fishing in a moiety of the river Usk, where it adjoins the defendant's freehold lands known as Pont Sandpit, and from obstructing the plaintiff, his lessees, licensees, and assigns, from a certain right of way, which the plaintiff claims along the edge of the river Usk over the Pont Sandpit grounds. The plaintiff by his statement of claim invites a much more ambitious judgment: he asks for a declaration that he is entitled to the bed of the river and a several fishery over the river Usk for a distance of twelve miles and a furlong; but I decline to enter into that larger question at all, as it is one which would affect the rights of parties who are not before the Court. An examination of what is put forward as regards that larger claim is, for certain purposes, material in determining the question which I have to decide, but beyond that I propose not to enter into the question of those rights at all.

The plaintiff claims to be entitled to what is known as the Crown Fishery, a fishery extending over twelve miles and a furlong from Maen-y-Wrath down to Redland Pool. The defendant's premises are situate on the left bank of the river (which flows from north to south) at a point some little distance below Usk. I have to consider the rights of the parties at that particular point. To ascertain that, I propose first to investigate the title which the plaintiff shews upon the documents which have been put in evidence to the whole of this fishery, of which the river opposite Pont Sandpit is part, to see whether the plaintiff is, or is not, entitled to a several fishery at the particular point in question, or is entitled to the

(1) 8 App. Cas. 142–4.

bed of the river and the right of fishing at that point, and next to investigate the difficulty which the defendant says arises from the existence of other fisheries which I shall have to mention. For the latter purpose I shall have to refer to the title of persons who are not parties to this action; but in the first instance I will take the title the plaintiff seeks to shew. [His Lordship recapitulated the documentary evidence of the plaintiff's title, down to the grant by the Crown of the fee in March, 1839, and continued, after a short reference to the laws under which the association now fished the river:—]

In tracing that title, therefore, it seems to me to be made out, on the part of the plaintiff, that he has become entitled to whatever it was that was originally granted in 1516 by the document which I first mentioned; and I now return to that lease in order to consider it, and as far as I can to form a judgment as to what really was the subject of that grant. The plaintiff claims a several fishery. There is no doubt that a several fishery means an exclusive right to fish in a given place, for which I may refer to *Malcomson* v. *O'Dea* (1) and *Holford* v. *Bailey*. (2) A several fishery may exist either apart from, or as incident to, the ownership of the soil over which the river flows; but since *Attorney-General* v. *Emerson* (3) it must be taken as settled that where a several fishery is proved to exist the owner of the fishery is to be presumed to be the owner of the soil, unless there is evidence to the contrary. This is so whether it is a navigable river: *Hindson* v. *Ashby* (4); or is a river neither public nor navigable: see *Foster* v. *Wright* (5) and *Ecroyd* v. *Coulthard*. (6) The question, therefore, which I propose to investigate on this grant of 1516 and the subsequent deeds, is whether the grant did amount to a grant of a several fishery, with the result that the soil in the river would pass to the owner of the several fishery by the words of the grant describing the fishery; and, inasmuch as the grant was not merely of the fishery, but also of the "wears in and upon the waters and rivers aforesaid," whether those words, "the

(1) 10 H. L. C. 593.
(2) 13 Q. B. 426.
(3) [1891] A. C. 649.
(4) [1896] 2 Ch. 11, 20.
(5) (1878) 4 C. P. D. 438.
(6) [1897] 2 Ch. 554, 570.

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wears," do of themselves grant the soil, so as to give to the grantee the soil and bed of the river, with the result that he would be entitled to the exclusive right of fishing, because he was owner of the land over which the water flowed.

Now the word which is used in this grant of 1516, and in the subsequent deeds, is "gurgites," and as to the meaning of the word "gurgites" various authorities have been referred to. In the first place, there has been cited Hale's De Jure Maris, which I read from Hargrave's Law Tracts, at p. 18, where Lord Hale says this: "Fishing may be of two kinds ordinarily, namely the fishing with the net, which may be either as a liberty without the soil, or as a liberty arising by reason of and in concomitance with the soil, or interest or propriety of it; or otherwise it is a local fishing, that ariseth by and from the propriety of the soil. Such are gurgites, weares, fishing-places, borachiæ, stachiæ, &c., which are the very soil itself, and so frequently agreed in our books." And again in Coke upon Littleton, 5 b: "Stagnum, in English a poole, doth consist of water and land; and therefore by the name of stagnum or a poole, the water and land shall passe also. In the same manner gurges, a deepe pit of water, a gors or gulfe, consisteth of water and land; and therefore by the grant thereof by that name the soile doth passe, and a præcipe doth lie thereof, and shall lay his esplées in taking of fishes, as breames and roches." In *Malcomson* v. *O'Dea* (1), Willes J., in advising the House of Lords, refers to that passage in Coke. He says this: "Much argument also took place with respect to the meaning of the words 'gurgites,' 'gors,' and 'wears.' They appear all to be words of more ample meaning than was allowed to them in the argument against the right. Of course we are principally concerned with the mediæval use of the word 'gurges'; though, inasmuch as the use of Latin in legal documents has been justified by its unchangeableness, we are at liberty to observe, that classic authors applied the word 'gurges' to the open sea, to a lake, and to the course of a river, instances of which are collected in the dictionary of Facciolati. As to the use of the word in later times, Lord Coke says"—then he reads

(1) 10 H. L. C. 619.

the above passage in Coke, and goes on to say: "To the same effect is the argument in *Throckmerton* v. *Tracy* (1), which shews that 'gurges' may stand for pool, and is of wider significance than 'wear,'" and so on. In *Attorney-General* v. *Emerson* (2) Lord Herschell reads the passage from Hale, and goes on to say: "Much learning was displayed in the effort made at the bar to explain the exact meaning of the different words used by Lord Hale in this passage. I do not think it necessary to follow the learned counsel in their endeavour to distinguish with precision between the various erections or constructions enumerated. I think they all have this in common that they are constructions or erections by which the soil is more or less permanently occupied, and that it is this occupation of a portion of the soil which leads Lord Hale to say that they are 'the very soil itself.'"

Dealing first with the use of the word "wears," I should from those authorities come to the conclusion that the grant of the weirs is a grant, not of a mere right of fishing, but of a corporeal hereditament consisting of the soil on which the weir is constructed. The same thing, I think, follows from *Malcomson* v. *O'Dea* (3), where a fishery was held to be a several fishery, the words of the grant being: "The profits of a certain fishery which is called 'Lax Wear' with its appurtenances." Again I find that Lord Selborne in *Neill* v. *Duke of Devonshire* (4) says this: "It is not disputed that the weirs ('kidelli' or 'gurgites') mentioned in the documents of title to which I have referred, did, from a remote antiquity, exist; nor that they were used for fishing purposes more or less exclusive of the public; nor that, in more modern times, their number was increased. This, in my opinion, is important evidence of an actual and continual possession and enjoyment, in or near those places, at all events, of some several fishery or fisheries. Weirs ('kidelli' or 'gurgites') were the means usual, in ancient times, for appropriating and enjoying several fisheries in tidal waters." From the use of the word "gurgites" in the documents, I should therefore come to the conclusion that there was a grant

(1) (1555) 1 Plowd. 145, 154.
(2) [1891] A. C. at p. 656.
(3) 10 H. L. C. 595.
(4) 8 App. Cas. 143.

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of the corporeal hereditament in the soil on which the weirs were constructed. But the relevance of the word "wears" does not stop there. In ancient times weirs were the means of taking fish: it was by means of putting an obstruction across the stream and intercepting the fish as they went up that the fish were taken. Therefore, when you find the grant of a weir, the grant of the place where you take the fish, and the grant of the bed of the river there, it seems to me that is of wider import; and that from it you are to infer, if there is nothing to the contrary, that the grant of the soil is not the grant of the soil merely where the weir is situated, but is the grant of the soil over which the river runs, and upon which there is the right to construct weirs for the purpose of taking fish.

There is a second ground, and that is this: What are the apt words, apart from the use of the word "weirs," to create a several fishery? Do you want the word "several"? Do you necessarily look for that word? I think the answer is, No. Mr. Neville has shewn me from the case of *Malcomson* v. *O'Dea* (1) and *Neill* v. *Duke of Devonshire* (2) that in neither of those cases do you find the word "several" used. You find a grant of the right of fishing, or the grant of the weir, or something of that kind, and from that there follows the inference that what is granted is a several right.

I pass from these considerations to see what we know as regards the attacks that have been made on this right in times past, and what has been established in litigation with respect to it. Before referring to the three several actions that I have mentioned, I must mention another matter which I did not mention before except in passing. Beyond this right of fishing in the river, the association and the predecessors of the association, the plaintiff and his predecessors, have claimed for very many years a certain right of way along the bank; and, in the first action that I am going to mention, it was a right of way that came in question; but it appears to me to be relevant also to the question of the fishery. [His Lordship then stated the facts as to, and the result of, the three actions—*Gardner*

(1) 10 H. L. C. 593. (2) 8 App. Cas. 135.

v. *Reece, Davies* v. *Phillips*, and *Stretton* v. *Phillips*—and continued :—]

Apart from the construction that I put on the documents, it seems to me that the result of those three litigations goes a great way to assist me in saying that the conclusion at which I have arrived by way of construction is right. This right has been claimed as a fishery for many years past, and the right of fishing to the exclusion of others has on those two occasions been sustained.

I pass now to consider the difficulties which the defendant says arise in supporting the claim on the part of the plaintiff to a fishery in this twelve miles and one furlong of the river, and here I have to say something about the claims of persons who are not parties to this action. I am not to be taken to be deciding in any way anything about their rights. I am only going to see how far, if at all, the existence of these alleged other rights must drive me to hold—contrary to what would otherwise be my judgment—that the right of fishing claimed by the plaintiff is not a several right of fishery. [His Lordship then stated the grant of 1223 to the abbot and monks of Tintern, and the evidence as to the devolution of the lordship of this fishery to the Crown in 1461, and continued :—]

What I observe on this grant of 1223 is, that although it was a grant to fish in the whole waters of Usk, the presumption would, in my opinion, be that it was confined to the waters of Usk abutting on the lands granted. Then there is licence or authority given to build a moiety of a weir thereon, which presumably would infer that the right of fishery in the Usk did not convey the soil of the Usk, because otherwise there would be no object in giving authority to build a weir on the soil at all, and certainly not to build a weir to the centre only of the stream.

Then on March 10, 1537, the King granted to Henry, Earl of Worcester—mark the date, March 10, 1537—the possessions of Tintern Monastery included in the grant of 1223. That was a grant in tail, and on January 21, 1668, there was a further grant to the then Marquis of Worcester of the reversion depending upon the estate tail, so that the whole of that got

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into the Marquis of Worcester, and subsequently passed to the Duke of Beaufort.

Now I pause here for the purpose of pointing out that that grant of the Tintern possessions having been executed on March 10, 1537, two days later, on March 12, 1537, the same party, the King, granted to the same party, Henry, Earl of Worcester, a lease for twenty-one years of the fishery which is described in the plaintiff's documents. Ought I or ought I not to assume that the right of fishing, whatever it is, which is referred to in the instrument of 1223, is the same right of fishing over the same water as is the subject of the lease of March 12, 1537? Primâ facie, it would be different. I do not know that I need pursue that further, because the observation upon that principally is that, whatever were the rights of the Duke of Beaufort under this grant, they are rights which do not extend down to the Pont Sandpit land with which I have to do, but terminate above the town of Usk.

The next thing which the defendant points to is this, that there is another fishery called the Trostry Fishery, which is first mentioned in a minister's account of the year 1546–47, which refers to certain tithes of the fishery of Trostry. The defendant says this must have been the fishery of Trostry now vested in Sir Arthur John Fludyer.

Then, on March 24, 1613, in 10 Jac. 1, there is a grant to Francis Morice and Francis Phillips in fee "of all that our fishery or fishing in the waters of Usk, and all places and creeks to the same appertaining, in the said county of Monmouth, now or late in the tenure or occupation of William Jones or his assigns, at the yearly rent of 7*l.* 13*s.* 5*d.*, lately being parcel of the possessions of the late Priory of Usk." This is what has been called the Priory Fishery, and I presume there was some Priory Fishery as to which we know little if anything more. But this same deed excepts and reserves "All manors of fisheries," and so on, "with their appurtenances in or within the rivers of Usk and Carleon with their members within the manors or lordships of Undy formerly being parcel of the possessions of the late Earl of March." So there you find an exception and reservation of that which the plaintiff

says existed, namely, this fishery in connection with the Earl of March. I do not think I need say more about the Trostry Fishery except that it was a fishery in the upper part of the river on the left bank above Usk.

Then there is a third fishery, which has been described as the fishery of the manor of Edlogan, or the ninth day fishery. That seems to have been a fishery commencing at a point far down the stream, and that is claimed as being owned in connection with the manor of Edlogan. The plaintiff is entitled to the manor of Edlogan. What that fishery was is not very exactly known, but again it is a fishery which did not extend over the Pont Sandpit land.

Now, the defendant is in a position to say, and to say with effect, as against the plaintiff that he cannot deny that these fisheries, or some of them at any rate, do exist. The defendant is also entitled to rely, and does rely, on the fact that in the lease of September 30, 1863, in favour of the Usk Fishery Association, the lessor expresses himself as demising the exclusive right of fishing, and so on—"Subject to the rights of fishing of his Grace the Duke of Beaufort, which were coextensive and equal with those of the said lessor from the points there specified, and also subject to the rights of fishing of one Sir Samuel Fludyer, Baronet, which were coextensive and equal with the rights of said lessor from the commencement of Trostry parish in said river, and extending to a limestone rock in the lower weir pool in said river in the same parish of Trostry." Now, is the existence of these other fisheries—Trostry and Monkswood—being as they are over a portion of the river which does not include the defendant's land, admissible on the question which I have to decide? It seems to me it is admissible. If authority is necessary for that, I should refer to *Jones* v. *Williams*. (1) I have to regard all the rights that are shewn in respect of the property over which the plaintiff claims his several right of fishery for the purpose of ascertaining whether he is entitled to a several right anywhere, and it is only for this reason that I am investigating these other rights. Also I would say this, with regard to the

(1) 2 M. & W. 326; 46 R. R. 611.

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Monkswood and Trostry fisheries, that it does not appear, so far as I can see, that the rights which are claimed are claimed as being either partial or limited, so as to be capable of existing concurrently with the several fishery of the plaintiff in those particular parts of the river. The existence of a concurrent partial right is legally possible. For instance, in *Seymour* v. *Lord Courtenay* (1), it was pointed out (2) that the right of taking oysters, or taking a particular class of fish, may exist with a several right of fishery; and again in *Ecroyd* v. *Coulthard* (3) is indicated the possible existence of a right to take lampreys in a several fishery. I say, in the defendant's favour that no doubt these other rights are not shewn to be partial or limited rights. All that I give him. Then I have to consider this: I have only to do with Pont Sandpit. What are the rights there? There is no trace, as far as I can find, of any coextensive right at all at Pont Sandpit; and then I ask myself, even if the right of the Monkswood Fishery and the Trostry Fishery and—if it be material—of the Edlogan or the ninth day fishery are inconsistent with the several right of fishery in those parts of the water, is there anything in that which would oblige me to say there is not a several right of fishery in the Pont Sandpit part of the water? It seems to me that there is not. Let me read upon that a few words from what Lord Selborne says in *Neill* v. *Duke of Devonshire* (4): "These written titles (if the possession and enjoyment has been consistent with them) afford irresistible ground for a presumption that the fishery, either in all the tidal waters of the river Blackwater, or at all events in that part of them which is now immediately in question, was 'put in defence' before Magna Charta; and having become vested in the Crown by forfeiture of the private rights from time to time acquired in it, was well and effectually granted to the predecessor in title of the Duke of Devonshire." That is to say there is a several fishery established so far, Lord Selborne means. Then he goes on: "the letters patent of King James I. and King Charles I. could not, of course, pass more than the Crown

(1) 5 Burr. 2815
(2) Ibid. 2817
(3) [1897] 2 Ch. 554,1566.
(4) 8 App. Cas. 143.

had then to give; they could not take away from the Dromana family (who had incurred no forfeiture) anything which rightfully belonged to them. But I cannot accede to the argument, that because the words of some of these grants would have been sufficient to pass the fishery in the whole river, if it had been then vested in the Crown, therefore they were ineffectual to pass the fishery in a moiety of those parts of the river in which the Crown had that, and no more, to give." Let me apply that. Supposing by the grant of 1223 the Crown had granted to Tintern and ultimately to the Duke of Beaufort a several or some right of fishery in the upper part of the river, and, therefore, had not in 1516 a several fishery to give to the Earls of Worcester in that part of the river, am I to infer from that, that if the grant in 1516 gave or purported to give to the Earls of Worcester a several fishery at Pont Sandpit, that the grantee did not get it because the Crown could not give a several fishery up at the Monkswood Fishery? It seems to me there may very well be a several fishery at Pont Sandpit even though it be a fact, as to which I say nothing, that there is no several fishery at Monkswood or Trostry.

Then I pass on to consider another view of the case. How has this thing been enjoyed? With regard to these Trostry rights and Monkswood rights in the claims which have been the subject of litigation to which I have referred, there is no trace of any claim to fish in this Pont Sandpit water adversely to the title the plaintiff sets up. There is evidence that people have fished this Pont Sandpit water as a right ever since 1856, and probably as far back as 1844. Then there has been a continuous and regular issue of fishing tickets, called "brinkers' tickets," to the occupiers of the land on the margin of the river and to the riparian owners within the boundary of this Crown fishery, who, if the right of fishing went with the land, would have the right to fish without them, and those tickets have been accepted as giving a limited right to fish; there have also been gifts of fish to the owners and occupiers, which have been accepted. These acts seem to me to be very material evidence for the purpose of considering whether those persons had any right

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as owners of the land, and whether those rights have been exercised.

It is urged on behalf of the defendant that persons other than the plaintiff and his lessees have from time to time, and for a long time, exercised acts of ownership upon the soil in the bed of the river, and the three acts relied on are these—first, what is known as "gorretting"; secondly, the taking of gravel; and, thirdly, the erection of fences opposite to the drinking-places for cattle. [Having described the nature and effect of these acts, his Lordship continued:—]

All those acts, it seems to me, are quite consistent with no claim on the part of those who did them to the soil of the river, but a claim to do what is reasonably necessary for the protection and enjoyment of their land abutting on the river. As to the materiality of acts of this kind, I will refer to what Lord Selborne says in *Neill* v. *Duke of Devonshire* (1): "The appellants' evidence of cot-fishing also extends to at least some part of the Bishops' fishery, which is admitted to be the property of the Duke. There, at all events, it must have been by sufferance, and not of right and (if so), why not also by sufferance elsewhere? Usage, continued during living memory, when there is nothing to the contrary, and when the question is one of prescription, may (no doubt) justify the presumption of a similar usage, as of right, from time immemorial. But when it is relied upon not to establish a prescriptive right, but to displace a prescriptive right, supported by written titles and evidence of long possession for a period earlier than, and coming down to, the time of living memory, it appears to me that such a presumption would be neither reasonable in fact, nor necessary in law. It would be extremely dangerous if titles, otherwise impregnable and supported by long enjoyment, could be overturned by evidence of that kind. 'It is the wise policy of the law,' said Heath J. in the celebrated gleaning case, *Steel* v. *Houghton* (2), 'not to construe acts of charity though continued and repeated for never so many years, in such a manner as to make them the foundation of

(1) 8 App. Cas. 156. (2) (1788) 1 H. Bl. 51, 60; 2 R. R. 715.

legal obligation.'" And Lord O'Hagan says (1): "An interruption may have been permitted through the absence of the proprietor; or through his ignorance, partial or complete, of the acts relied on; or through his neglect or indifference to them as not vitally affecting, in his own case, his interest or position; or as requiring from him, for the purpose of resistance, effort or expense unjustified by the necessity of the case; or as allowed from kindly or benevolent motives to humble people for a great length of time. And it would not seem just, as it would not be legal, on the ground of such an interruption, so tolerated, to pronounce the forfeiture of his vested estate." It appears to me that I can entirely give effect to these various acts of gorretting, gravel getting, and cattle fencing by referring them to an absence of objection, by the owner of the bed of the river, to an act which did him no harm, and which was reasonably convenient, or necessary if you will, for the protection or enjoyment of the property of the riparian owner.

I arrive therefore at the conclusion that as regards that portion of the river which lies opposite Pont Sandpit the defendant has not shewn anything to displace that which I think the plaintiff primâ facie makes out, namely, the right to a several fishery on lands opposite Pont Sandpit either by the form of the grant of the fishery in the original deeds, implying, as in *Malcomson* v. *O'Dea* (2) and in *Neill* v. *Duke of Devonshire* (3), a several fishery, or by reason of the grant of the weirs carrying with it the soil amounting in effect to a conveyance of the bed of the river, with the consequence that there results the right to fish over the land thus belonging to the grantee. [After referring shortly to the defendant's title and finding as a fact that he must be taken to have known, when he purchased in 1878, that the association claimed to enjoy, as of right, the fishing opposite and abutting on his land, and that it was only in 1900 that he claimed to exclude fishermen from passing over his land, his Lordship continued:—]

I now pass to the question of the right of way. If the

(1) 8 App. Cas. 170. (2) 10 H. L. C. 593.
(3) 8 App. Cas. 135.

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plaintiff has, as I have held he has, the soil in the river opposite Pont Sandpit, then there is no difficulty in his having a right of way appurtenant to the corporeal hereditament which he thus enjoys; but supposing I am wrong upon that, and that he has not a corporeal but an incorporeal hereditament, the question has been raised whether he could enjoy a right of way as appurtenant to a hereditament which on this hypothesis would be incorporeal. Upon that a passage has been referred to in Coke upon Littleton, at p. 121 b, which runs thus: "Concerning things appendant and appurtenant, two things are implied. First, that prescription (which regularly is the mother thereof) doth not make anything appendant or appurtenant, unlesse the thing appendant or appurtenant agree in quality and nature to the thing whereunto it is appendant or appurtenant." Pausing there, I should understand that to mean that the corporeal thing must be appendant to something corporeal, and the incorporeal thing must be appendant to something incorporeal; but it is evident that that is not what Lord Coke meant, for he goes on to explain: "As a thing corporeall cannot properly be appendant to a thing corporeall, nor a thing incorporeall to a thing incorporeall." I cannot help thinking that the language somehow must have gone wrong there. At any rate, you have to find here that properly a thing incorporeal cannot be appendant to a thing incorporeal. If the right of fishing is incorporeal, then it is said the right of way, which is incorporeal also, cannot be appendant or appurtenant. But there is a note (7), and the note is this: "This position is not universally true. It sometimes fails as to things appurtenant. Return of writs or a leet may be appurtenant to an hundred; so may waif and stray to a leet; and yet in these instances both subjects are incorporeal. The true test seems to be the propriety of relation between the principal and the adjunct; which may be found out, by considering whether they so agree in nature and quality as to be capable of union without any incongruity." I adopt that note as giving the true and real test which ought to be applied to a case of this kind, and then, if I am wrong in holding that the fishing right which the plaintiff has is corporeal, and if it

is only incorporeal, I should still hold that he could have a right of way appendant or appurtenant to that thing, because it appears to me there is no incongruity in the union of the two. Consider what it is. The one supposed incorporeal right is a right of fishing in the river. The other incorporeal right is a right to walk along the bank for the purpose of fishing in the river. What is there incongruous in the union of those two? One seems to me very clearly congruous to the other. You can scarcely enjoy the one without using the other. Even if the thing be incorporeal and the right of fishing were incorporeal, I think there could still be a right of way; but inasmuch as I have held it to be corporeal, the question does not arise.

Now, what is the evidence as to the right of way at Pont Sandpit, because that is the point I have to consider? I do not say all the way down the right bank and all the way down the left bank there is a right of way; but what is the evidence with regard to Pont Sandpit? The evidence with regard to Pont Sandpit is that for fifty-seven years past this right has been used. I accept the evidence of the plaintiff's witnesses, and I think it is proved that the way along the Pont Sandpit land has been enjoyed for at least the last fifty-seven years, and there is also the evidence of the action which I have mentioned in which the question of the right to drag nets on to the land was the subject of litigation and decision. That is only consistent with the existence of a similar right for fishermen to pass elsewhere on lands bordering on the river.

It seems to me, therefore, the plaintiff has made out the right which he claims.

Solicitors: *Foyer & Hordern; Thomas White & Sons, for Gustard & Waddington, Usk.*

W. C. D.

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*June* 19.

## *In re* SEPTIMUS PARSONAGE & CO.

[00111 of 1901.]

*Company—Winding-up—Contempt of Court—Fraudulently Circularising Shareholders while Winding-up Petition pending—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 145.

When a petition is pending for the winding-up of a company, it is a contempt of Court to issue a circular to the shareholders of the company containing misrepresentations with the intent to obtain a resolution of the company for the voluntary winding-up thereof, and thereby mislead the Court as to the real view of the shareholders and prevent a compulsory winding-up order from being made.

On March 21, 1901, a creditor of Septimus Parsonage & Co., Limited, presented a petition for the compulsory winding-up of the company. On the following day there was a board meeting, at which four directors, including S. Parsonage, J. V. Criper, and H. T. Gould, were present, and it was then decided to call an extraordinary general meeting of the company to pass a resolution for its voluntary winding-up. Later in the day Gould called on Parsonage and told him that on reconsidering the matter he had come to the conclusion that it would not be proper for the directors to take the course proposed, and that he should oppose it if it was persisted in. During this interview Gould made some reflections on Parsonage's conduct as a director of the company. Parsonage consulted Criper, and originated the idea of sending a circular to the shareholders, and Criper apparently agreed. A circular was drafted by Parsonage and approved by Criper. It was alleged that the circular was submitted to and approved by a gentleman who had been, but was not then, the company's solicitor; but it was not shewn that he knew on whose behalf it was issued. Then Grace was sent for by either Parsonage or Criper, and, after some hesitation, was induced to sign the circular. He was then in the company's export department at a salary of 32*s.* a week, and held 200 fully paid preference shares in the company, which had been given to him by Parsonage.

The circular sent to the shareholders was dated March 26,

and bore the address of Grace, at Southend, and was signed by him. It was as follows: "Dear Sir,—Re Septimus Parsonage & Co. (Limited). Referring to the circular we have received from the directors, convening a meeting for Monday next, to pass resolutions for the liquidation of the company, I am taking the liberty, as one of your brother shareholders, to ask your support in steps I propose taking, at my own expense, to make a thorough investigation into the past management of the business and the causes which have brought this unexpected and disastrous crisis. We were led to believe at the last general meeting that all difficulties had been overcome, and that the company was in a sound financial position; and, so far as I have been able to ascertain, no new misfortune or losses have occurred since that date. How can the directors reconcile the course they are now adopting with the positive assurances they gave us on the occasion referred to? I am a large shareholder, and, although I must bear the loss if the failure has been brought about by legitimate misfortune, I do not intend doing so unless and until I have exhausted every effort to satisfy myself beyond doubt that the balance-sheets and reports issued by the directors are honest and can be substantiated in every detail. I shall, of course, attend the meeting personally, but if you are unable to do so I would ask you to entrust me with your vote by at once returning me the enclosed form, signed, so that the same may reach me, if possible, by the morning of the 29th instant."

This circular was printed on the instructions of Parsonage and Criper, or one of them, and the copies were taken by Grace to or sent to him at Southend, with the proxy papers referred to, and the prints and proxies were there posted by Grace. In response he received the proxies of shareholders holding 60,000 shares in the company. The directors held a considerable number of other proxies, they and Grace together being thus able to command a clear majority.

At the meeting, which was held on April 1, a resolution for voluntary winding-up was moved by Parsonage and seconded by Criper. An amendment was moved by a shareholder for the appointment of a committee of investigation, and this was

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seconded, put to the meeting, and on a show of hands declared not to be carried. Grace alleged that he voted for the amendment, but he did not use his proxies or demand a poll. An amendment was then moved that the company should be wound up compulsorily, and this was seconded by Gould. On a show of hands it was apparently carried, but a poll was demanded, and the proxies held by Grace and the directors were used in favour of a voluntary winding-up, a resolution for which was passed.

Another form of circular was, on April 4, sent to Grace with instructions as to getting it printed. It was printed at Southend, and despatched from that place by Grace. It bore the same address, was dated April 9, and signed by Grace, and purported to describe what had taken place at the meeting, and explained Grace's action there, and concluded as follows: "I trust I have acted in accordance with your wishes, and would ask you to kindly fill up and return to me the enclosed form expressing your opinion of the way in which I used your proxy, as my action has been criticised in some quarters."

An order was subsequently made for the winding-up of the company by the Court.

The circulars were then referred to, and the Court directed the official receiver to make an investigation of the matter, and report thereon to the Court.

The report having been made, by the special direction of the judge a motion was made on behalf of the official receiver that Parsonage, Criper, and Grace might be committed for contempt of Court, in that, whereas a petition was pending for the compulsory winding-up of the company, they conspired together to obtain, by misrepresentations to the shareholders thereof and other improper means, the passing of a resolution of the company for the voluntary winding-up thereof, with intent to mislead the Court as to the real views of such shareholders and prevent a compulsory winding-up order from being made.

*Sir R. B. Finlay, A.-G.*, and *R. J. Parker*, for the applicant. It is clear that if in the course of judicial proceedings

attempts are made to mislead the Court, that is a contempt of Court. In the present case a petition for winding-up was pending when the circulars were issued, and the existence or non-existence of a voluntary winding-up was an element in determining whether a compulsory winding-up order should be made. The result of sending out the first circular was that a number of proxies were used in favour of a voluntary winding-up resolution, which without them would not have been carried. That resolution was intended to be, and was in fact, used for influencing the Court not to make a compulsory winding-up order, and all the three respondents have been guilty of a contempt of Court. Although Grace ought to have been more cautious, some allowance ought to be made for him having regard to his position, and it is hoped the Court may not think it necessary to deal very severely with him.

*Shee, K.C.*, and *R. Edmondson*, for the respondents. Grace acted as he did without realizing what he was doing, and Parsonage and Criper take upon themselves the responsibility. The two directors stand in a rather different position. They did not intend to mislead the Court. In doing what they did they were not thinking of the Court at all. The attempt made was to assist Parsonage by obtaining a voluntary winding-up, and the real object was to defeat Gould. They thought it would be better for Parsonage that the charges made against him by Gould should be investigated in a voluntary winding-up. Gould himself at first approved of a voluntary winding-up, but changed his mind the same day. It was a reasonable thing for the two directors to consult a solicitor, but it is only just to him to say that he did not know who was going to sign the circular. Grace had also consulted a solicitor. Circularising in company matters is an every-day occurrence, and the object was only to checkmate Gould and not to deceive the Court. We trust that the Court will act mercifully to the respondents.

WRIGHT J. Mr. Shee has said everything on behalf of his clients in the best way it could possibly be said, and I certainly

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shall go as far as I can in the direction he asks me; but I must consider how far I can go. I say nothing about either of the two solicitors for the simple reason that they are not before me.

As regards the three persons who are before me, Parsonage, Criper, and Grace, there is no question at all that a fraud of the grossest kind has been committed by them, and the only question is how far that ought to be regarded as a fraud upon the Court, or an attempt to interfere with the action of the Court.

On March 21, 1901, a petition was lodged by a creditor of the company asking that it might be wound up by the Court, and on the following day three of the directors, Parsonage, Criper, and Gould, met and considered the matter. There was some discussion between them, and on the very same day it appears that the circular which is the foundation of this matter was prepared by Parsonage and approved by Criper. It does not tend to commend Parsonage to my mind at all that in his affidavit he seeks to make out that a solicitor was the author of this circular. It is clear from the rest of the evidence in the case, and from Parsonage's own statement, that Parsonage and Criper were the authors of that document, and that all that the solicitor did was in substance to approve their work, although he may have altered it in some respects.

Now, the circular prepared after the petition for winding-up had been lodged was in substance this: Grace put himself forward as an independent shareholder, and a large shareholder, hostile to the directors and determined upon a thorough investigation of the management of the business of the company at his own expense, and he asked as a brother shareholder for proxies to be used as against the directors. Now in reality Grace was a man of straw, put up by Parsonage and Criper to act solely in their interests in the matter, and to put forward a false circular which purported to come from him as a large independent shareholder at Southend-on-Sea. That circumstance in itself induces one to ask what benefit or purpose could be suggested, as a reason that this circular should be posted at Southend, unless it was for the purposes of fraud. The secretary is informed beforehand by Parsonage

in these words: "I have arranged all matters for you at the meeting."

Then the meeting comes on. Grace obeys the orders he has received from Parsonage and Criper, and the 60,000 proxies which have been collected are, in spite of protest, used by Grace in favour of a voluntary liquidation. He did not use the proxies for the purpose for which they were given, but for defeating that purpose. The effect was that the shareholders were not only entrapped into giving their proxies, which were used in a way different from that which was intended, but the shareholders were deprived altogether of their representation. As regards the shareholders, it appears that the grossest of frauds was perpetrated, by means of conspiracy, and by means of false pretences that Grace was a large independent shareholder, that he had collected proxies as such, and that he was a shareholder living at Southend who in the ordinary course of things was asking for proxies.

Now, so far there is no doubt, and the real and only question is how far I ought to consider that this fraud was directed against the Court. I cannot think that Parsonage and Criper were so ignorant as not to know why they wanted a voluntary liquidation when there was a creditors' petition pending for a compulsory winding-up order. I think I must give them credit for knowing perfectly well that if the resolution for a voluntary liquidation was passed it would destroy the power of the Court to make the compulsory winding-up order, unless there was proof, which it is sometimes not very easy to obtain, that the petitioning creditor would be prejudiced by the continuance of the voluntary winding-up. It seems to me an obvious inference that all that was done by the respondents was done for the purpose of defeating the creditors' petition, and that what they wanted to avoid was a compulsory winding-up. Parsonage, Criper, and Grace, knowing that there was already a petition before the Court asking for a compulsory winding-up, went to the meeting with 60,000 proxies, besides those held by the two directors, and used the proxies in favour of a voluntary liquidation, obviously with the knowledge that their so doing would defeat the compulsory winding-up. I think I should be failing

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in my duty if I did not consider that the inference ought to be drawn that the intention was to do that which was the obvious consequence of obtaining the resolution for voluntary winding-up, and the importance of which in the eyes of these persons may be measured by the frauds to which they were willing to condescend in order to accomplish their ends.

Where there is a real interference with the jurisdiction of the Court, which is perhaps a better phrase than contempt of Court, the Court has no option but to act, however unwilling it is to deal with matters affecting the liberty of the subject, and, inasmuch as a case of the kind I have stated is made out, it is my duty to commit Parsonage to prison for six weeks. Criper, I think, is in some respects less guilty than Parsonage, because I do not think he was so much the originator of the matter as Parsonage was, although he took a considerable part in it himself. Criper will therefore be committed for four weeks. As for Grace, I give effect to the recommendation of Mr. Attorney-General.

Parsonage and Criper will be committed for the terms I have mentioned, and they must pay the costs of the motion.

Solicitor for applicant: *Solicitor to the Board of Trade.*
Solicitors for respondents: *Mason, Son & Turnbull.*

F. E.

## *In re* STATE OF WYOMING SYNDICATE.

WRIGHT J.

1901

*June* 25.

[0017 of 1901.]

*Company — Winding-up — Meeting to Pass Resolution for Winding-up — Requisition of Shareholders — Notice issued by Secretary without Authority of Directors — Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 51, 129, 145; *Sched. I., Table A, cl.* 32 — *Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *s.* 13.

After a requisition for an extraordinary meeting has been deposited under s. 13 of the Companies Act, 1900, the meeting can only, within the next twenty-one days, be summoned by the directors acting together as a board, and the secretary of the company cannot on his own responsibility lawfully summon the meeting.

*In re Haycraft Gold Reduction and Mining Co.*, [1900] 2 Ch. 230, followed.

*Quære*, whether, if the twenty-one days expire without any meeting being summoned by the directors, the requisitionists can call the meeting by notices signed by the secretary.

A company was governed, so far as the calling of meetings was concerned, by Table A (in Sched. I. to the Act of 1862), clause 32 of which says that "the directors may, whenever they think fit . . . . convene an extraordinary general meeting." By the articles of association two directors constituted a quorum. A requisition was sent to the directors in accordance with s. 13 of the Companies Act, 1900, requesting them to convene a meeting to pass an extraordinary resolution for voluntary winding-up. Within the twenty-one days allowed to the directors, by s. 13, for convening the meeting, the secretary of the company, without the authority of the directors, summoned the meeting. At the meeting two directors, the requisitionists, and many shareholders were present, and the resolution was passed by the required majority.

At the hearing of a petition by a creditor for the compulsory winding-up of the company, the defence was set up that a voluntary winding-up was pending, and that the petitioner did not shew that he was thereby prejudiced:—

*Held*, that the secretary had no power to issue the notices, that there was no ratification of his act, that the so-called ratification of the company was invalid, and that a compulsory winding-up order must be made.

The State of Wyoming Syndicate, Limited, was registered under the Companies Acts in October, 1899, with articles of association which provided as follows: "The provisions of Table A in the First Schedule of the Companies Act, 1862 (except where the same are inconsistent with or superseded by

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the annexed articles), and the following special articles, shall be the articles of association of the company."

"17 . . . . Subsequent general meetings," after the first general meeting, "shall be held at such time and place as the directors may from time to time appoint."

"20 . . . . Until otherwise determined two directors shall form a quorum for the transaction of business."

Among the clauses of Table A which applied as regulations of the company were clauses 32 to 35.

Clauses 32 provides that, "The directors may, whenever they think fit . . . . convene an extraordinary general meeting." The rest of clause 32 and clauses 33 and 34 are superseded by s. 13 of the Companies Act, 1900. (1)

Clause 35 of Table A requires seven days' notice at the least of a meeting to be given to the members.

On April 25, 1901, seven members of the company holding the required proportion of the issued capital signed and sent in a requisition in writing, addressed to the directors of the com-

(1) 63 & 64 Vict. c. 48, s. 13: "(1.) Notwithstanding anything in any regulations of a company, the directors of a company shall, on the requisition of the holders of not less than one-tenth of the issued capital of the company upon which all calls or other sums then due have been paid, forthwith proceed to convene an extraordinary general meeting of the company.

"(2.) The requisition must state the objects of the meeting, and must be signed by the requisitionists and deposited at the office of the company, and may consist of several documents in like form each signed by one or more requisitionists.

"(3.) If the directors of the company do not proceed to cause a meeting to be held within twenty-one days from the date of the requisition being so deposited, the requisitionists, or a majority of them in value, may themselves convene the meeting, but any meeting so convened shall not be held after three months from the date of such deposit.

"(4.) If at any such meeting a resolution requiring confirmation at another meeting is passed, the directors shall forthwith convene a further extraordinary general meeting for the purpose of considering the resolution and, if thought fit, of confirming it as a special resolution; and, if the directors do not convene the meeting within seven days from the date of the passing of the first resolution, the requisitionists, or a majority of them in value, may themselves convene the meeting.

"(5.) Any meeting convened under this section by the requisitionists shall be convened in the same manner, as nearly as possible as that in which meetings are to be convened by directors."

pany, requiring them to convene an extraordinary general meeting of the company for the purpose of considering, and if thought fit passing, the following extraordinary resolutions: "(1.) That it has been proved to the satisfaction of the meeting that the company cannot by reason of its liabilities continue its business, and that it is advisable to wind up the same, and accordingly that the company be wound up voluntarily under the provisions of the Companies Acts, 1862 to 1900. (2.) For the appointment of a liquidator for the purpose of such winding-up."

William Lees and William Pinkney, two of the requisitionists, were directors of the company.

On April 29, 1901, a notice was sent to the shareholders that an extraordinary general meeting of the company would be held on May 10, 1901, for the purpose of considering and if thought fit passing the above-mentioned extraordinary resolutions, which were set out in the notice.

The notices were signed "A. B. Wilkins, Secretary"; but although Wilkins was the secretary of the company he issued the notices on his own responsibility and without any authority from the directors.

The meeting was held on May 10, 1901. Lees and all the other requisitionists except Pinkney were present, and Lees held a power of attorney from Pinkney.

W. C. E. Serjeant, another director of the company, and a large number of its shareholders also attended the meeting, which by the majority required passed extraordinary resolutions (1.) for voluntary winding-up in the terms above stated; (2.) that G. E. Pike should be appointed liquidator for the purpose of such winding-up.

On May 16, 1901, Serjeant, who was a judgment creditor of the company for over 700*l.*, presented a petition against the company, alleging that he had issued execution against the company, but that the sheriff had made a return of nulla bona, and asking that the company might be wound up by the Court.

The petition was afterwards amended by stating what had occurred at the meeting, that the so-called resolutions were invalid inasmuch as the meeting had not been convened by

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any person having authority to convene it, and that if there was a voluntary winding-up, its continuance would prejudice the rights of the creditors for the reasons set out in the amended petition.

*Gore-Browne*, for the petitioner. There is no voluntary winding-up of the company. The so-called extraordinary resolution for winding-up is invalid because it was only convened by the secretary, and he had no authority to convene it. Where a requisition is sent in under s. 13 of the Companies Act, 1900, the directors of the company are to convene an extraordinary meeting, and they are the only persons who can, within twenty-one days from the receipt of the requisition, call the meeting which is thereby required. Assuming the meeting actually called was not in pursuance of the requisition, but called independently, s. 129 of the Act of 1862 requires the extraordinary resolution to be passed in such manner as would, if it had been confirmed at a subsequent meeting, have constituted a special resolution. Sect. 51 of the same Act, defining a special resolution, requires a three-fourths majority at a meeting of which notice is given and which is itself held "in manner prescribed by the regulations of the company."

Clause 32 of Table A, which is one of the regulations of this company, says that "the directors" may summon a meeting. Therefore, whether the provisions of s. 13 of 1900 or the regulations were acted on, only the directors could convene the meeting, and on s. 129, and an article similar to clause 32 of Table A, Cozens-Hardy J. held a resolution for voluntary winding-up passed at a meeting to be ineffectual because the notices had been issued by the secretary without the authority of a resolution of the directors assembled as a board: *In re Haycraft Gold Reduction and Mining Co.* (1)

The omission is not as to a mere matter of form. If any one could summon a meeting, meetings might be convened on the same day and at the same hour at different places for different purposes.

*Martelli*, for the company, the person named as voluntary

(1) [1900] 2 Ch. 230.

liquidator, and certain shareholders. It cannot be disputed that there has been a technical irregularity, but it has been waived or condoned. A great number of the shareholders, all the requisitionists, including one who was represented by his attorney, and two of the directors, the number required to make a quorum, attended the meeting, and in a case like this the Court will not interfere, or be astute to hold that an irregularity is fatal which could and would have been set right if it had been discovered. By s. 13 of 1900 the directors are ordered to summon a meeting when a requisition has been sent in. Their summoning of a meeting is a merely ministerial act. "A court of equity refuses to interfere where an irregularity has been committed, if it is within the power of the persons who have committed it at once to correct it by calling a fresh meeting and dealing with the matter with all due formalities": *Browne* v. *La Trinidad.* (1) The Court is always slow to interfere where there has been only a neglect of matters of internal regulation: *Foss* v. *Harbottle.* (2)

The secretary, having acted as agent of the directors, but without their authority, the directors' ratification of his act related back so as to render valid the notices sent out by him: *Bolton Partners* v. *Lambert.* (3)

The fact that the number of directors necessary to form a quorum attended at the meeting and took part in its proceedings amounted to a ratification of the secretary's acts. There was no confirmation or ratification of the secretary's acts in *In re Haycraft Gold Reduction and Mining Co.* (4) Moreover, the decision of Cozens-Hardy J. in that case is inconsistent with *Collie's Claim.* (5)

[WRIGHT J. In that case the dealing held to be binding on the company was with an outsider.]

The provisions of the Act of 1862 and the articles have no application to the present case; the meeting was summoned under s. 13 of the Act of 1900. [He also referred to *Southern Counties Deposit Bank* v. *Rider and Kirkwood.* (6)]

(1) (1887) 37 Ch. D. 1, 10.
(2) (1843) 2 Hare, 461.
(3) (1889) 41 Ch. D. 295.
(4) [1900] 2 Ch. 230.
(5) (1871) L. R. 12 Eq. 246.
(6) (1895) 73 L. T. 374.

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WRIGHT J. In my judgment it is clear in law that the meeting could not have been properly summoned on the day on which it was summoned except by the directors. It could not be summoned by the requisitionists because the twenty-one days limited by s. 13 of the Act of 1900 had not expired. I need not decide whether requisitionists can, after the expiration of the twenty-one days mentioned in the section, call a meeting by notices signed by the secretary. But before that period had expired only the directors could call the meeting, and the secretary could not, without their authority, summon a meeting.

This is admitted by Mr. Martelli, but he says there has been a mere irregularity in the internal affairs of the company which could have been immediately set right and would have been set right if the existence of the irregularity had been known, and that it is contrary to the established principles of equity to regard such a matter as this as an irregularity which is fatal to the validity of the proceedings. This is a serious question, and no one would desire to infringe on *Browne* v. *La Trinidad* (1), and the rules laid down in that and other cases. But I hesitate to apply the principles of those cases to a case like this. Nothing can be more important than the question whether a company should proceed to voluntary liquidation, especially when a petition for a compulsory winding-up order is pending against the company, and it seems to me that proceedings of this kind ought to be conducted with substantial propriety. I think that Cozens-Hardy J. acted on this view of the law in *In re Haycraft Gold Reduction and Mining Co.* (2), where the question was whether the resolution for winding-up was valid. He says (3): "In the present case I cannot regard the omission to convene a board meeting to consider matters of such vital moment as a winding-up of the company and the appointment of a liquidator as a mere irregularity," and he then goes on to point out that the winding-up in that case was part of a scheme devised for an improper purpose. I am not for a moment suggesting that that is the case here. I think I should

(1) 37 Ch. D. 1. (2) [1900] 2 Ch. 230.
(3) [1900] 2 Ch. 236.

not be deciding in accordance with the decision of Cozens-Hardy J. if I were to hold that in a matter of this kind a secretary could act entirely on his own authority. If he does summon a meeting without authority I do not think I ought to hold that a resolution passed at the meeting is valid. If it had been a mere question of informality with reference to the constitution of the board which summoned the meeting, for instance, some question as to whether there was a proper quorum present, I might have applied the principle of *Browne* v. *La Trinidad* (1), but I think I should be going too far if I held that it applied to the present case.

No doubt two directors, the requisitionists, and many shareholders were present at the meeting, and there would have been great reason for argument if there had been full knowledge of the irregularity and the directors had done anything to recognise the act of the secretary as their act. Then a different question would have arisen; but there is no question here of ratification, and I must hold that the meeting was improperly convened, and that no valid resolution for the voluntary winding-up was passed. There will therefore be the usual compulsory order for winding-up.

No imputation is made with regard to the secretary, and the gentleman named as voluntary liquidator must have his costs out of the assets.

Solicitors for petitioner: *Judge & Priestley.*

Solicitors for company and liquidator: *Robbins, Billing & Co.*

(1) 37 Ch. D. 1.

F. E.

BYRNE J.
1901
July 4.

## *In re* YATES.
## YATES *v.* WYATT.

[1900 Y. 779.]

*Will—Construction—Maintenance and Education—Annuity to Widow for Benefit of Infants—Trustee—Death of Widow—Annuity continued.*

A "further annuity" of 300*l.* given by a testator to his widow, for the maintenance and education of his infant daughter, does not cease to be payable by reason of the death of the widow during the minority of the daughter.

Adjourned Summons.

This was an application by the two infant daughters of the testator, W. C. Yates, for the direction of the Court as to their education and maintenance, which was adjourned into Court on the question of construction, whether, under the wording of the gift, two annuities of 300*l.* each, given by the testator to his widow for the maintenance and education of his daughters, had ceased by the death of the widow during the minority of the daughters. The will, so far as material, was as follows:—

The testator, who died in September, 1897, by his will of January, 1894, devised and bequeathed his real and personal estate to his executors and trustees upon trusts for conversion at their discretion and investment, and directed them, out of the rents, dividends, and annual income thereof, to pay to his wife so long as she should continue his widow, "such a sum as should together with the income from her marriage settlement amount to the sum of 1000*l.* per annum," by equal quarterly payments, and also to "pay to my said wife, by the like equal quarterly payments, a further annuity of 300*l.* per annum, until my daughter Charlotte shall attain the age of twenty-one years, and to be applied by her my said wife in and about the maintenance and education of my said daughter." Then followed a direction to pay to his wife "a further annuity of 300*l.*" in precisely similar terms in favour of another daughter, Kathleen, and a declaration that the receipt of his said wife for the said two annuities of 300*l.* should exonerate his said trustees from

all liability to see to the application thereof, and from any responsibility in respect of the misapplication or non-application thereof. The testator then directed his trustees, "subject to the payment of the annuities hereinbefore bequeathed," to accumulate the rents and income of his real and personal estate until his said daughter Charlotte should attain the age of twenty-one years, and on the happening of that event to stand possessed of one moiety of the accumulations, and also of one moiety of the corpus of his real and personal estate, upon trusts for his said daughter for her life, and then for her children and issue in the usual way; the remaining moiety of the accumulations, and of the corpus of his real and personal estate, was to be accumulated until the other daughter, Kathleen, attained twenty-one, when it was to be settled upon her for life, and then upon her children and issue in the same way as her sister's share was settled.

The widow died in October, 1900. The two daughters were now about seventeen and fifteen years of age, and a scheme for their maintenance and education became necessary; but before anything could be settled, the trustees wished to obtain the opinion of the Court, on the construction of the will, to know whether they could still treat these annuities as available for this purpose.

*J. G. Wood*, for the infants. The object of this gift was to provide a fund for the maintenance and education of these infants; the widow was not intended to derive any benefit from it: she was, in fact, only a trustee; the duration of each annuity must depend on the minority of the child, not on the life of the widow. The effect of the will is to create a trust, the widow being the trustee; and no trust is allowed to fail merely from the death of the trustee. The annuities are therefore still available for maintenance, and the trustees of the will would be justified in continuing to pay the annuities for the purposes for which they were originally given.

*G. Henderson*, as representing next of kin. The testator naturally believed the infants would live with their mother, and he gave her these "annuities" to help her to maintain them. Now that the mother is dead, the annuities are no

BYRNE J. 1901 YATES, *In re.* YATES *v.* WYATT.

longer payable. This is a gift of a "further annuity" to the widow, and therefore a gift personal to her; except that the gift is to be, to some extent, for the benefit of the daughters, there is nothing to shew that the widow was constituted a trustee for her children. A joint benefit was given to the widow and the daughters, while living with her; on the death of the widow, the annuities ceased to be available.

*M. Romer*, for the trustees of the will.

BYRNE J. On the whole I come to the conclusion that these annuities are still payable, notwithstanding the death of the widow. [Having stated the words of the gift and receipt clause as above, his Lordship continued:—]

The primary object, therefore, of the testator appears to have been to make provision for the maintenance and education of his daughters until they attained twenty-one, when they would come into their share of his estate; and he has not in my opinion made his widow anything more than a trustee for the daughters of these annuities; she is not to have any benefit from the annuity herself, though he expressly provides that her receipt is to exonerate the trustees from all liability to see to the application of this income; and this clause would not have any operation after the daughters attained twenty-one. It is also to be observed that the direction to accumulate the surplus income is subject to the payment of these annuities. Having regard, therefore, to the fact that the testator was making this provision for the benefit of his two daughters during their minorities, I am of opinion that these annuities have not ceased to be payable by reason of the death of the widow during the infancy of the daughters. I think I am justified in putting this construction on the words used by the testator in this will, and the result, therefore, is that, notwithstanding the death of the widow, these annuities are still available for the education and maintenance of these infants. The rest of the summons will be referred back to chambers to settle a scheme for their maintenance, having regard to the opinion I have expressed.

Solicitors: *Bird & Eldridges; Nicholson, Graham & Graham.*

W. C. D.

JOYCE J.
1901
*March* 28;
*April* 17, 18;
*May* 23.

## *In re* DU BOCHET. MANSELL *v.* ALLEN.

[1900 D. 1237.]

*Will—Construction—Illegitimate Children—Class Gift.*

A testatrix bequeathed her residuary estate in trust equally for all such of the children being daughters of her nephew R., her niece Mrs. A., and her niece Mrs. H., as should attain twenty-one or marry under that age, each child to be paid her share on attaining that age or marrying under it. At the date of the will and of the testatrix's death the nephew R. was cohabiting with a woman reputed to be his wife, and there was issue of this union three daughters, two born before the date of the will, and one born after the date of the will, but before the date of the death. The nieces had several daughters, one of whom had attained twenty-one at the date of the testatrix's death. The testatrix had always spoken of R.'s reputed wife as his wife, and the three daughters as their children, there being no suspicion of illegitimacy. Upon the arrival of the time for the final distribution of the estate it was discovered that R. did not marry his reputed wife until some years after the death of the testatrix:—

*Held*, that the two children born before the date of the will were entitled to participate, but that the child born afterwards was not entitled.

*Holt* v. *Sindrey*, (1868) L. R. 7 Eq. 170, and *Hill* v. *Crook*, (1873) L. R. 6 H. L. 265, discussed.

Julia Elizabeth Du Bochet, spinster, by her will made on July 17, 1876, bequeathed her residuary estate "in trust equally for all such of the children (being daughters) of my nephew Richard Du Bochet, my niece Alice Allen, wife of Josiah Allen of Ripley, Derbyshire, and my niece Julia Hall, wife of George Hall, as shall live to attain the age of twenty-one years or marry under that age, and each child shall be paid her share on attaining that age or marrying under it," and the will contained a provision for the maintenance, education, and advancement of each child out of the income of her presumptive share.

The testatrix died on July 2, 1883.

Richard Du Bochet, the nephew, was then, as he had been for many years previously, living with a lady known as Mrs. Du Bochet, reputed and believed by the testatrix and the rest of the family to be his lawful wife, and there was issue of this

JOYCE J. 1901 DU BOCHET, *In re.* MANSELL *v.* ALLEN.

union three daughters, Gertrude and Alice, born before the date of the will, namely, on October 11, 1873, and March 4, 1875, and Jessie, born after that date, namely, on April 8, 1879.

At the date of the testatrix's death Mrs. Allen had issue two daughters, and Mrs. Hall had issue two daughters, one of whom, Alice Hall, had recently attained twenty-one, and shortly afterwards one-seventh part of the residue was paid to her on the footing that the three daughters of Richard Du Bochet were entitled to participate under the will.

Recently the time arrived to make a final distribution of the estate. Then, to the surprise of everybody other than Mr. and Mrs. Du Bochet themselves, it was elicited, in answer to inquiries made by the surviving trustee of the will for the usual formal evidence of the title of the claimants, that Richard Du Bochet had not been in fact married to his reputed wife until the year 1890. Thereupon the surviving trustee took out an originating summons to have it determined whether the reputed daughters of Richard Du Bochet or any of them were entitled to the balance remaining undistributed of the residuary estate, or who were now entitled to the fund.

It appeared from the evidence that the testatrix had always regarded her nephew and his reputed wife as lawfully married. She spoke of and treated Mrs. Du Bochet as her nephew's wife, and her three daughters as their children, there being no suspicion of illegitimacy.

The most important piece of evidence in support of the above facts consisted of a series of letters written by the testatrix to her nephew between the years 1875 and 1880.

On behalf of the daughters of Mrs. Allen and Mrs. Hall it was objected that these letters were not admissible in evidence; but the Court overruled the objection, and held that they were admissible as evidence of surrounding circumstances.

*Marcy*, for the trustee.

*Badcock*, K.C., and *E. Ford*, for the reputed children of Du Bochet. First, as to the two elder children who were born before the date of the will. Evidence is admissible to shew that the testatrix uses the word "children" in a secondary

sense. Extrinsic evidence is admitted if it can in any way be made ancillary to the right interpretation of a testator's words; for the words of a testator tacitly refer to the circumstances by which he is surrounded: Wigram on Extrinsic Evidence, Props. III. and V., and placitum 76. In the present case the letters and other evidence shew clearly that the testatrix believed these children to be the legitimate children of her nephew, and it is impossible to escape the conclusion that it was these very children who were the objects of her bounty. Even letters written after the date of the will are admissible: *In re Vaughan.* (1) Where the intention is clear, the Court must give effect to it without insisting upon any technical interpretation of words, and recent cases shew that the Courts are not inclined to make any presumption in disfavour of illegitimate children: *Holt* v. *Sindrey* (2); *In re Jodrell* (3); *In re Haseldine* (4); *In re Deakin* (5); *In re Jeans.* (6)

*Dorin* v. *Dorin* (7) is distinguishable, because, looking at this will in the light of the surrounding circumstances, there would be repugnancy and inconsistency in reading "children" in the strict primary sense.

Secondly, as to the third child, who was born after the date of the will, she also is entitled to a share. It is doubtful whether the rule against provisions for illegitimate children ought to be applied to wills at all: *Wilkinson* v. *Adam* (8); and certainly it is the date of the death and not of the will which is to be regarded: *Occleston* v. *Fullalove.* (9) In the present case one of the class of children was over twenty-one at the testatrix's death, so that the class was closed, and the will could not operate in favour of any after-born children, whether legitimate or illegitimate.

*Ashton Cross*, for the daughters of Mrs. Allen and Mrs. Hall. The testatrix did not know the true facts of the case, and it is said that if she had it would have made no difference. An attempt has been made on behalf of the Du Bochet children

(1) (1901) 17 Times L. R. 278.
(2) L. R. 7 Eq. 170.
(3) (1890) 44 Ch. D. 590.
(4) (1886) 31 Ch. D. 511.
(5) [1894] 3 Ch. 565.
(6) (1895) 72 L. T. 835.
(7) (1875) L. R. 7 H. L. 568.
(8) (1813) 1 V. & B. 422, 468; 12 R. R. 255; 14 R. R. Preface x.
(9) (1874) L. R. 9 Ch. 147.

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to bring in evidence of the testatrix's intention under the guise of giving evidence as to the surrounding circumstances. To say that the surrounding circumstances may be made the testator's dictionary for the purpose of giving a secondary meaning to the word "children" is to go beyond the authorities. *Dorin* v. *Dorin* (1) shews that the word "children" in a will primâ facie means "legitimate children" as much as if the word "legitimate" had been inserted before it. That was a very strong case, because the will was made by the reputed father in favour of the children by the woman with whom he had been cohabiting on the very day after he had married her, and therefore at a time when he could not have had any legitimate children to answer the description. There are two classes of cases only in which the primâ facie interpretation is departed from—one, where it is impossible from the circumstances of the parties that any legitimate children could take under the bequest; the other, where the testator's will is taken as a dictionary to ascertain the meaning of the terms he has used: *Hill* v. *Crook*. (2) This case does not come within either of these classes, and this extrinsic evidence to shew who are the objects of the testatrix's bounty is not admissible. Unless the will contains something which requires to be explained, extrinsic evidence will not be admitted to override the will. The most that can be said is that the Court may look at the surrounding circumstances to ascertain the meaning of the words there used. *In re Fish* (3) shews that illegitimate children cannot take in competition with legitimate children, and that evidence for that purpose is not admissible.

*Badcock, K.C.*, in reply.

*Cur. adv. vult.*

May 23. JOYCE J., after stating the facts substantially as above set out, and observing that at the death of the testatrix the class to take under the will was incapable of increase, continued as follows:—Upon the facts properly admissible in evidence and proved I do not, nor, as I believe, does any one else, entertain

(1) L. R. 7 H. L. 568. (2) L. R. 6 H. L. 265, 282, 285.
(3) [1894] 2 Ch. 83.

the smallest doubt that the testatrix died in the full belief that the three reputed daughters of Richard Du Bochet were included, as children being daughters of Richard Du Bochet, in the class among whom she had directed her residuary estate to be divided. It is now contended that they are not so included, and that none of them takes a share.

In *Holt* v. *Sindrey* (1) the facts are thus stated in the head-note to the report in the *Law Journal*: A testator bequeathed a fund to trustees upon trust during the life of his daughter M., the wife of J. L., for her separate use, and after her death upon trust for "all and every the child and children of his said daughter M. L., begotten or to be begotten." The testator was not aware when he made his will that his daughter M. L. was not the wife of J. L.; and that four children then borne by her to J. L. were illegitimate. The testator had always treated his daughter M. and J. L. and their children as if the parents had been married and their children lawfully begotten. After the date of the will M. L. bore three other children to J. L. which were also illegitimate. M. L. died without having had any other children. It was held that the four children born before the date of the will were, although illegitimate, sufficiently described in the will as legatees, and that they were entitled to the fund. I have read the head-note from the report in the *Law Journal*, for the head-note in the report in the *Law Reports* is imperfect and erroneous, as pointed out by Lord Selborne in *Occleston* v. *Fullalove*. (2) As appears by the report in the *Law Journal*, Mr. Hinde Palmer admitted that the three children born after the date of the will could not claim any part of the fund. This decision is an undoubted authority. It has never been overruled nor, so far as I am aware, questioned, and in numerous cases it has been implicitly if not expressly recognised.

*Crook* v. *Hill* is reported in the *Law Reports* in the Court of Appeal (3) and sub nom. *Hill* v. *Crook* in the House of Lords. (4) I think that the head-note is hardly accurate in either report. In the report in the House of Lords it is, I think,

(1) L. R. 7 Eq. 170; 38 L. J. (Ch.) 126.
(2) L. R. 9 Ch. 147, 154.
(3) (1871) L. R. 6 Ch. 311.
(4) L. R. 6 H. L. 265.

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not only inaccurate but misleading. The facts were as follows: A testator gave a legacy to his "son-in-law John Crook," and gave leaseholds to trustees upon trust during such part of the testator's term and interest therein as his "daughter Mary, the wife of the said John Crook," should happen to live, to pay the rents to her for her separate use "independently of her present or any after-taken husband," and after her decease he directed that the premises should go, remain, and be upon such trusts for such one or more of the children of his said daughter Mary Crook in such manner as his daughter Mary Crook should by will appoint; and in default of appointment as in the will mentioned. The testator died on March 22, 1859. The marriage between John Crook and Mary Crook, which had taken place with the testator's sanction in 1854, was, to the knowledge of the testator, void, John Crook having been the husband of Mary Crook's deceased sister. They had two children born in the testator's lifetime who were recognised by the testator as his grandchildren. At the date of the will Mary Crook was enceinte with a third child born after the testator's death and named Robert Crook, and subsequently she had another—that is a fourth—child. Mary Crook died in 1868, having by her will exercised her power of appointment in favour of such of her four children as, being sons, should attain twenty-one, or, being daughters, should attain that age or marry. The two eldest children of Mary Crook filed a bill against the trustees and executors, making their brother Robert Crook also a defendant, praying to have it declared that the plaintiffs and, if the Court should be of such opinion, the defendant Robert Crook were intended by the testator's will to take as children of his daughter Mary Crook. It was not suggested that the fourth child had any interest. The executors demurred, and the demurrer was allowed by Stuart V.-C. The plaintiffs appealed. The Lords Justices reversed his Honour's decision. The case then went to the House of Lords, when the decision of the Lords Justices was affirmed. The gift there in question was not, as I understand the case, that set out in the head-note in the report in the House of Lords, but the one which preceded it and is not set out, and the

decision was not that there was a sufficient designation of the children of Mary as the intended objects of the testator's bounty, but that there was such a designation of the two children of Mary who were born before the date of the will of the original testator. Lord Cairns in concluding his judgment says distinctly (1): "I do not go over what has been said .... as to the impossibility of providing for future illegitimate children; that is out of the question here. The question here is, whether these children who have filed this bill, and who were born before this will was made, can take under this will; and in my opinion they can." And Mellish L.J. at the end of his judgment in the Court of Appeal said (2): "I consider that we are bound to say, according to the principle laid down in the authorities, that the two children who were born before the date of the will are entitled to take under the gift. We are not called upon to decide whether the third child, who was in ventre sa mère at the date of the will, and at the testator's death, is entitled to participate."

The third child was ultimately held entitled to participate, as appears by the report of the case upon further consideration before Hall V.-C. (3)

In the Court of Appeal James L.J. says (4): "The question, then, resolves itself into this: whether, having regard to the language of this will, guarding ourselves scrupulously against indulging in conjecture, or in an attempt to do what we think the testator would have done if he had been better informed or better advised, but taking into consideration the whole of the will and the whole of the surrounding circumstances at the time the will was made, which are legitimately to be brought in for the purpose of explaining his expressions, though not for the purpose of altering or adding to them, there is in this case so strong a probability of intention to include, or not to exclude, the children in question, as that a contrary intention cannot be supposed?" Applying that test to the present case, I hold upon the facts proved and appearing by admissible evidence (and in my opinion no rational person can

(1) L. R. 6 H. L. 265, 285, 286.
(2) L. R. 6 Ch. 311, 320.
(3) (1876) 3 Ch. D. 773.
(4) L. R. 6 Ch. 315.

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doubt) that the testatrix when she made her will intended the two girls then in existence, whom she knew and regarded with affection, to be included in the class among whom her residuary estate was to be divided, subject to their attaining the age of twenty-one years or marrying. In other words, there is so strong a probability of it being the intention of the testatrix to use in her will the words "children being daughters of my nephew Richard Du Bochet" as including the two children Gertrude and Alice Du Bochet, that a contrary intention cannot be supposed.

I am of opinion, therefore, that at all events the children Gertrude and Alice must be treated and share, as daughters of Richard Du Bochet, in the distribution of the residuary estate of the testatrix under this will, notwithstanding that they take as members of a class with the legitimate children of other persons. But with respect to the youngest child Jessie, who, though born in the lifetime of the testatrix and fully recognised by her, was not in existence at the date of the will, there is a serious difficulty, she not having been a reputed child of Richard Du Bochet at the date of the will. *Crook* v. *Hill* (1), as I have shewn, is no authority for admitting her to share. In *Occleston* v. *Fullalove* (2) a testator made a bequest to his reputed children C. and E. and all other children whom he might have or be reputed to have by M. L. (his deceased wife's sister), then born or thereafter to be born. A third child was born in the testator's lifetime, but after the date of the will. It was held by James and Mellish L.JJ. (dissentiente Lord Selborne) reversing Wickens V.-C. that this third child was entitled to share. In *In re Goodwin's Trust* (3) Sir George Jessel says: "The principle of the decision in *Occleston* v. *Fullalove* (2), as I understand it, is this, that a gift by a testator or testatrix to one of his or her children by a particular person is perfectly good if the child has acquired the reputation of being such child as described in the will before the death of the testator or testatrix." In *In re Bolton* (4) the facts stated in the head-

(1) L. R. 6 Ch. 311; L. R. 6 H. L. 265.
(2) L. R. 9 Ch. 147.
(3) (1874) L. R. 17 Eq. 345.
(4) (1886) 31 Ch. D. 542.

note were as follows: G. B. went through the ceremony of marriage with J. A. C., whose husband had deserted her and gone abroad many years before, and was believed to be dead, but G. B. was aware that there was no certain information of his death. Shortly afterwards G. B. made his will, by which he gave "to my dear wife J. A. B., formerly J. A. C.," an interest in certain residuary personalty during widowhood, and after her decease or remarriage he gave the corpus to "all and every my child and children" as therein mentioned, and in default of children to his nephews and nieces. G. B. and J. A. C. cohabited for more than a year and a half after the date of the will, when G. B. died leaving J. A. C. enceinte of her only child. She enjoyed the income of the residue till her death, upon which event the nephews and nieces claimed the property under the gift over, and proved that J. A. C.'s child was illegitimate, her former husband having been alive at the time of her marriage to the testator. The Court of Appeal, affirming the decision of Kay J., held that the child could not take. Cotton L.J. there says (1): "*Occleston* v. *Fullalove* (2) was much relied on, but in my opinion that case does not cover this, and leaves untouched the rule that there cannot be a valid gift to a future illegitimate child described only by reference to paternity. In that case the gift was to two reputed children whom the testator named, and all other the children which he might have or be reputed to have by Margaret Lewis then born or thereafter to be born. The Court thought that a description sufficient to include an illegitimate child of which Margaret Lewis was enceinte when the will was made. . . . But you cannot treat 'child' as denoting a man's reputed child, unless a particular child is referred to. To ascertain whether this child is the testator's child we should have to inquire into circumstances which the law does not permit to be inquired into. The argument really comes to this, that the testator's description of the woman as his wife carries with it the same consequences as to children born during the cohabitation as if there had been a valid marriage. *Crook* v. *Hill* (3) is quite

(1) 31 Ch. D. 552. (2) L. R. 9 Ch. 147.

(3) 3 Ch. D. 773.

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different from the present case, and I am unable to come to a conclusion in favour of the appellant." He then proceeds to record his dissent from the view expressed by Sir George Jessel in *In re Goodwin's Trust.* (1) Moreover, in *Occleston* v. *Fullalove* (2), James L.J. points out the great practical difference between a gift to the future illegitimate children of a male and a gift to the future illegitimate children of a female (as in *In re Hastie's Trusts* (3)).

I should have been glad to have held the gift in the present case to have been equivalent to a gift to "all the children being daughters which my nephew Richard Du Bochet may be reputed to have by his reputed wife." But, after much consideration and with regret, I do not, in the face of the decision of Kay J. and the three Lords Justices in *In re Bolton* (4), see my way to admitting the daughter Jessie, born and begotten after the date of the will, to any share under the residuary gift.

Solicitors: *Tucker, Lake & Lyon, for Gem, Docker & Tarleton, Birmingham; Eley & Winch.*

(1) L. R. 17 Eq. 345.
(2) L. R. 9 Ch. 147, 163, 164.
(3) (1887) 35 Ch. D. 728.
(4) 31 Ch. D. 542.

H. B. H.

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BYRNE J.
*May* 3.
C. A.
*June* 12.

[1901 G. 586.]

*Local Government—Surface Drain—Sewer—Nuisance by Sewage—Drainage of Houses—Notice to Local Authority—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 21.

A drain, which ran along a highway past a village and emptied itself into a disused quarry at the foot of the plaintiff's garden, had been used for many years to carry surface water, and also slop water, from some of the houses adjoining the highway. This drain was originally a highway drain, but was now a sewer vested in the rural sanitary authority under the Public Health Act, 1875. The solid sewage matter from the houses in the village drained into cesspools; but recently one of the householders, purporting to act under s. 21 of the Public Health Act, without any notice to the local authority, constructed a water-closet and discharged the solid sewage matter therefrom into this drain by means of a communication which he already had with the drain for the purpose of carrying off his slop water, thereby causing a nuisance to the plaintiff:—

*Held*, by Byrne J. and by the Court of Appeal, that he ought to be restrained by injunction: by Byrne J., following *Kinson Pottery Co.* v. *Poole Corporation*, [1899] 2 Q. B. 41, on the ground that the permission of the local authority to use the drain for the passage of slop water did not authorize its user for every kind of sewage matter; by Collins L.J., on the ground that the conditions imposed by the section as to notice and otherwise had not been complied with.

MOTION.

This was an application by an owner and occupier against three neighbouring occupiers to restrain a nuisance by sewage. The nuisance was not denied, the main question argued being whether the plaintiff was justified in proceeding against the defendants instead of the local sanitary authority. The facts which were admitted were shortly as follows:—

The plaintiff, a widow lady, was the occupier and trustee for her infant son, the owner, of a messuage and grounds called "Green Bank," at Wetheral, in the county of Cumberland. The village of Wetheral, situate on the river Eden, though containing some 800 inhabitants, had not up to the present time any regular sewage system, but only closets with cesspools, and in a great many cases only earth-closets. There had existed for many years in the village of Wetheral a horseshoe-

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shaped drain running along one side of the high road from a point near the post-office in an easterly direction, which, after crossing the road and passing under the plaintiff's garden, emptied itself by a fall of nearly 80 feet into an old disused quarry, also the property of the plaintiff and adjoining her garden. In 1886 this drain was lifted, covered over, and relaid by the vestry as the highway authority, and gratings were also put in so as to allow the surface or rain water from the high road to run into this drain. For many years this covered drain had been used solely for conveying surface water and slop water from some of the houses in the village adjoining the high road; but recently some of the inhabitants adjoining the high road had discontinued the use of cesspools, and now discharged solid sewage matter into this drain, thereby causing an intolerable nuisance to the plaintiff, so that she could not with any degree of comfort or safety open the windows on the side of the house adjoining the quarry, or walk in the gardens or pleasure-grounds which were in close proximity thereto. The plaintiff commenced this action against three neighbouring occupiers, who were believed to have recently connected water-closets in their houses with this covered drain, claiming damages from the defendants for discharging water-closet drainage and filth upon the land of the plaintiff from houses in their respective occupation through this covered drain, and an injunction restraining the defendants from continuing to cause or suffer the said discharge upon the said land through the said drain.

The plaintiff moved before Byrne J. on May 3, 1901, for an interim injunction in the terms of the latter part of her claim.

No notice, in compliance with s. 21 of the Public Health Act, 1875, had been given by the defendants to the local authority before using this covered drain for water-closet refuse; no fresh connection being necessary, it was contended that no notice was required.

*Levett, K.C.*, and *S. Lushington*, for the plaintiff. No notice has been given to the local authority under s. 21 of the Public

Health Act; the defendants are not entitled to cause their drains to empty into this sewer without notice. Even assuming that this drain along the high road is a "sewer" within the meaning of the Public Health Act, it is not a sewer for all purposes; and the defendants had no right to discharge solid sewage into it: *Kinson Pottery Co.* v. *Poole Corporation.* (1)

*Norton, K.C.*, and *Alexander Glen*, *Stokes*, and *Maugham*, for the defendants. We have a right under s. 21 to discharge all drainage into this sewer, notwithstanding the fact that by so doing a nuisance is caused to third parties. When once the sewage is discharged into a sewer, the onus is on the local authority to see that it is properly dealt with. For years the defendants have drained surface and slop water into this sewer through the existing connections; the mere addition of a water-closet requires no fresh connection and no fresh notice.

[They referred to *Ferrand* v. *Hallas Land and Building Co.* (2); *Molloy* v. *Gray* (3); *Kirkheaton Local Board* v. *Beaumont* (4); *Fordom* v. *Parsons* (5); *Brown* v. *Dunstable Corporation* (6); *Russell* v. *Knight and M'Donald* (7); *Peebles* v. *Oswaldtwistle Urban Council* (8); *Ainley* v. *Kirkheaton Local Board.* (9)]

*Levett, K.C.*, in reply.

BYRNE J., after referring to the nature of the action, observing that it was not an information brought by the Attorney-General, so that he had nothing to do with the question of public nuisance, and stating the facts, came to the conclusion that as against one of the defendants (Mr. Hendry) he ought not to grant any relief on an interlocutory application, as he appeared to have been doing what the plaintiff now complained of for many years prior to the commencement of this action. His Lordship then continued:—

The real question I have to decide is, whether I ought to

(1) [1899] 2 Q. B. 41.
(2) [1893] 2 Q. B. 135.
(3) (1889) 24 L. R. Ir. 258.
(4) (1888) 52 J. P. 68.
(5) [1894] 2 Q. B. 780.
(6) [1899] 2 Ch. 378.
(7) *The Times*, May 9, 1894.
(8) [1897] 1 Q. B. 384.
(9) (1891) 60 L. J. (Ch.) 734.

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grant an interim injunction against the other two defendants, whose water-closets have been quite recently connected with this covered drain. It appears that the defendant Wroughton's house, when he became tenant of it, contained a lavatory, sink, and outside privy, but no water-closet, so that whatever passed into this drain was only liquid matter of a more or less offensive kind, but nothing in the shape of solid matter passed into it; the same state of circumstances applies to the other defendant.

These defendants seek to justify the discharge of solid sewage matter into this drain under s. 21 of the Public Health Act, which provides that the owner or occupier of any premises within the district of a local authority shall be entitled to cause his drains to empty into the sewers of that authority, on condition of his giving such notice as may be required, and complying with the regulations of the authority as to the mode in which the communications are to be made. I will assume, for the purposes of my judgment, that the original connection with this covered drain was lawfully made for the purpose of carrying away from the defendants' houses liquid matter of the kind carried down this drain prior to the date of the erection of the water-closets, and also that this drain is a "sewer" within the meaning of the Public Health Act, as for some purposes it undoubtedly is. Then it is argued that no connection has been made between the house drains and the sewer by what has been done in reference to these water-closets, because it has been merely a question of utilising the existing connection to pass the new matter into this sewer. I cannot accept that proposition. It appears to me that it is none the less causing the "drains to empty into the sewer" because you join your new pipes to an old drain which already empties into the sewer. But, passing that by, I think that the question that really arises in the present case is this: Are private owners, who have lawfully (and I must take it for the present purpose that they have lawfully) caused their drains to empty into this sewer for the purposes for which it was used prior to the erection of these water-closets, justified in further causing these drains to empty into this sewer fæcal and solid matter coming from the water-

closets? And this resolves itself into the question whether, if a sewer is used for the purpose of carrying off one kind of sewage, that necessarily involves a right to use that sewer for the purpose of carrying off all other kinds of sewage.

Now the argument, which has been extremely well and forcibly urged on me by counsel for all the defendants, is this: You can find no authority which says that, where a sewer has been used for one kind of sewage, the persons entitled so to use that sewer may not pour sewage of any description into the same drain; that if they are entitled to send any portion of their household drainage into this sewer, they are entitled in addition to send into it (without notice to the local authority and without their permission) household drainage of any description.

The case of *Kinson Pottery Co.* v. *Poole Corporation* (1), before a Divisional Court, has been referred to and relied on by the plaintiff. In that case the company were summoned by the sanitary authority of a borough for non-compliance with a notice to abate a nuisance, caused by turning slop and scullery water from twelve houses owned by the company, the appellants, into a drain constructed beside a highway to receive the surface water of the highway, which emptied into an open ditch. According to the plan deposited with the sanitary authority when the houses were built by the appellants' predecessors in title, the houses should have been drained into cesspools, but cesspools to receive the slop and scullery water had not been constructed. No sewer had been constructed by the sanitary authority by means of which the houses could be drained. The justices made an order to abate the nuisance by disconnecting the drains of the houses from the surface water drain and making cesspools for the houses, and their decision was affirmed. Now there what had been allowed to pass into the drain was surface water, and in the present case more than surface water, namely, slop water and liquid refuse from the houses, has been allowed to pass into the drain; but with that exception, the reasoning of the learned judges seems to form a complete guide in the present case. The finding of the

(1) [1899] 2 Q. B. 41.

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justices is as follows (1): "that the drain in question being constructed by the respondents for the sole purpose of receiving the surface water from the highway, could not lawfully be used by the appellants to carry off scullery and slop water from their houses, and that the appellants had created the nuisance in the open ditch, into which the surface water drain discharged." Darling J. in giving judgment says (2): "I agree that for certain purposes the surface water drain was a sewer, but it is contended that therefore the appellants have a right to turn into it any refuse they please, and then it is for those who own the sewer to deal with the state of things so caused. In my opinion that is not the law. Sect. 21 of the Public Health Act, 1875, entitles an owner to cause his drains to empty into the sewers of a local authority, on giving notice, and complying with the local authority's regulations; but that does not entitle an owner to empty all kinds of filth into a small roadside drain, and leave the local authority to deal with it as best they can, and moreover here no notice was shewn to have been given. To hold otherwise would lead to an absurd result; and whether notice had been given or not, I do not think that the appellants had a right, under the general law, independently of the permission referred to in the case, to turn into the surface water drain even rain water, and still less had they a right to turn into it slop and scullery water, as to which no permission had been given." Then Channell J. says (3): "It is contended that this surface water drain was a sewer, and I think it was for some purposes. It was intended to carry off mere surface water, yet it was a 'sewer,' within the words of the definition contained in s. 4 of the Public Health Act, 1875. But to entitle the appellants to succeed, it would be necessary to go further, and shew that it was a sewer which the appellants had a right to use as they did. If they had any such right, it could only be by s. 21, which requires notice to be given. I do not wish to say that if notice had been given in pursuance of that section, there would have been a right to empty the slop and scullery water into this surface water drain, for I agree that it is

(1) [1899] 2 Q. B. 44. (2) [1899] 2 Q. B. 47.
(3) [1899] 2 Q. B. 48.

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unnecessary to decide that question; but here no notice was given. I think the appellants cannot lawfully empty sewage into a mere water sewer."

Looking again at the present case, here was a drain which, when it came into the control of the local authority, had been used for a surface water drain, and had, either before or after it came under their control, been allowed by them, either expressly or tacitly, to be used for carrying other liquid and deleterious matter, some of which, at all events, might come within the general name of sewage, though not being sewage within the meaning applied to it in ordinary parlance. But nothing more had been allowed, so far as the evidence before me goes, and no notice was given under s. 21 of an intention to cause the drains to empty this fresh matter into this sewer.

I think that if a public authority, being the owner of a sewer, has allowed it to be used for certain specific purposes, one of those purposes being the carrying off of liquid drainage matter, that does not justify its user for these other matters to which I have referred. I think, in principle, the case of *Kinson Pottery Co.* v. *Poole Corporation* (1) really is a governing authority in the present case, and I think it would be drawing a distinction (which I am not justified in drawing) too refined, if I were to say it was not so.

I think therefore that, as against two of the defendants, the plaintiff is entitled now to the injunction which she asks, though, of course, I shall allow a reasonable time to enable them to make other arrangements.

W. C. D.

C. A.

From this decision the defendant Wroughton appealed. The appeal was heard on June 12, 1901.

*Alexander Glen* and *Maugham*, for the appellant. This being a sewer vested in the local authority under s. 13 of the Public Health Act, 1875, a householder has under s. 21 an absolute right to empty into it any kind of sewage which is ordinarily emptied into sewers: *Eastwood Brothers, Limited* v. *Honley Urban Council* (2); *Brown* v. *Dunstable*

(1) [1899] 2 Q. B. 41. (2) [1901] 1 Ch. 645.

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*Corporation* (1); *Ainley* v. *Kirkheaton Local Board* (2); and he is not concerned with what happens to the sewage after it passes into the sewer: *Ferrand* v. *Hallas Land and Building Co.* (3) If a nuisance is thereby created, the sanitary authority, and not the householder, are responsible for it: *Kirkheaton Local Board* v. *Beaumont* (4); *Ainley* v. *Kirkheaton Local Board* (2); *Kirkheaton Local Board* v. *Ainley, Sons & Co.* (5); *Fordom* v. *Parsons.* (6) The plaintiff's only remedy in this case is under s. 299 against the local authority: *Brown* v. *Dunstable Corporation.* (1)

*Kinson Pottery Co.* v. *Poole Corporation* (7) is distinguishable, because there a fraud was committed on the local authority, and the drain was admittedly used as a highway drain for surface water only, whereas this sewer was already used for carrying liquid sewage, and, speaking generally, there is no ground for discriminating between different kinds of sewage. The Act of 1875 draws no such distinction, and the contrary is assumed in the Public Health Acts Amendment Act, 1890, s. 16, which prohibits the importation of injurious matter into the sewers.

[COLLINS L.J. Suppose two parallel sewers, one for clean water and one for foul, could an owner elect to discharge fæcal matter into the clean water sewer?]

No. By s. 24 the local authority might compel drainage into the other sewer; but, further, the Act is not contemplating an aqueduct, and this drain is very different from an ordinary watercourse.

Then it is said that the appellant has not complied with the provision in s. 21 as to notice; but, first, no notice was necessary because no new communication was made with the sewer, and, when once the communication is made, the owner may discharge into the sewer anything which it will carry: *Metropolitan Board of Works* v. *London and North Western Ry. Co.* (8) Secondly, the condition in the section is to give

(1) [1899] 2 Ch. 378.
(2) 60 L. J. (Ch.) 734.
(3) [1893] 2 Q. B. 135, 140.
(4) 52 J. P. 68.
(5) [1892] 2 Q. B. 274.
(6) [1894] 2 Q. B. 780.
(7) [1899] 2 Q. B. 41.
(8) (1881) 17 Ch. D. 246.

"such notice as may be required by the authority," and, it not being shewn here that the local authority have issued any regulations as to notice or required any particular notice to be given, they must be presumed to have waived this condition: *Ainley* v. *Kirkheaton Local Board.* (1)

[They also referred to *Wheatcroft* v. *Matlock Local Board* (2); *Falconar* v. *South Shields Corporation* (3); *London and North Western Ry. Co.* v. *Runcorn Rural Council* (4); *Croysdale* v. *Sunbury-on-Thames Urban Council* (5); *Sykes* v. *Sowerby Urban Council.* (6)]

*Levett, K.C.*, and *S. Lushington*, for the respondent. *Kinson Pottery Co.* v. *Poole Corporation* (7) was rightly decided, and it covers this case. When the Act of 1875 was passed, and for many years afterwards, this drain was not a sewer within the definition in s. 4, because it was within the exception therein contained, being a drain under the control of an authority having the management of roads, and not being a local authority under the Act. It was a highway drain with a rather extended user; but at that time there could have been no statutory connection with it because it was within the exception, and therefore it is unnecessary to argue the question whether, the defendant having obtained a statutory connection with the drain, that gives him the right to discharge into it any sewage matter without notice to the local authority. The appellant cannot, by taking the law into his own hands without the knowledge or consent of the local authority, burden the plaintiff's property with a greater easement than it has hitherto been subject to. It is said that because there is a drain in existence the appellant has a right under s. 21 to pass fæcal matter through it, although it creates a nuisance, and that the only persons to be sued are the local authority. *Kinson Pottery Co.* v. *Poole Corporation* (7) shews the contrary. But, further, he must comply with the

(1) 60 L. J. (Ch.) 734.
(2) (1885) 52 L. T. 356.
(3) (1895) 11 Times L. R. 223.
(4) [1898] 1 Ch. 561.
(5) [1898] 2 Ch. 515.
(6) [1900] 1 Q. B. 584.
(7) [1899] 2 Q. B. 41.

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conditions of the section, and the onus is on him to prove either that he gave the notice or that no notice was required. If the local authority have not made any regulations as to notice, he must give a reasonable notice. Stirling J.'s decision in *Ainley* v. *Kirkheaton Local Board* (1) merely comes to this—that if the by-laws do not cover the case, it must be governed by the common law. But notice is not the only condition imposed by the section. There are three conditions. First, notice must be given; secondly, the regulations of the authority as to the mode of making the communication must be complied with; thirdly, the householder must allow the authority's surveyor to superintend the work. The appellant has complied with none of these conditions.

*Glen*, in reply.

RIGBY L.J. I think that this appeal fails. I think that the order made is quite right, and that no grounds have been shewn upon which we can set it aside.

COLLINS L.J. I am of the same opinion. This case has travelled over a wide area of decision upon the question of sewers and drains under the Public Health Act; but I think, when we come to the narrow point which has actually to be decided in this case, that it will not be necessary to deal in any detail with those cases.

The point arises shortly in this way. There is in the village of Wetheral, for anything that appears to the contrary, an adequate system of sewage, so far as fæcal matter is concerned. It seems that the practice there was to deal with that matter by privies and a cesspool, and in one case a private water-closet, but, for anything that appears to the contrary in this case, the general scheme which now exists there is perfectly adequate. There is also running along the highway a drain, which it is admitted—at all events it is not denied, and the evidence is in favour of it—was originally simply a highway drain, and belonging as such to the highway authority, which

(1) 60 L. J. (Ch.) 734.

was not the local authority in question. Subsequently as far back as 1886 that drain was improved at the expense of the vestry, still being the highway authority, and persons occupying houses along that highway had, no doubt with, possibly, the tacit assent of the highway authority, connected their houses with it for the purpose of sending down slops and that class of water. This state of things continued until this local authority came into existence, and took over the control of the highway, which I think was in 1894; and so things went on until 1900, when the appellant in this case, without any notice to the local authority, made a water-closet on his land, and connected it with a communication which he already had with the highway drain, and which had been used for passing soapsuds and that class of liquid down the drain.

He contends that he is justified in doing what he did by virtue of the Public Health Act; but what he has to meet in the first instance is this. The matter which he sends from his water-closet passes directly through the channel I have described into the bottom of a disused quarry, which is part of the plaintiff's premises, and, as I understand, immediately adjoins her garden. The effect of that is to create, as the learned judge says, an intolerable nuisance. It is true that the plaintiff had to submit to an inconvenience which may have amounted to a nuisance from the accumulation of soapsuds and that class of liquid in the quarry at the bottom of her garden; but what the appellant has done is to make that a nuisance of a very aggravated character by sending down fæcal matter from his water-closet directly into the quarry at the bottom of the garden, and, supposing he had done that without the communication with the drain of the local authority, no one could question that he would have committed a tort for which an action at the suit of the owner of the garden would lie against him. But he says, "I do not deny that a nuisance in which I have taken part is created on the land of the plaintiff, but I am entirely discharged from any personal liability in respect of the matter, inasmuch as the channel by by which I have conveyed that nuisance on to the land of the

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plaintiff partly consists of this highway drain, which is a sewer vested in the local authority."

In order to get the immunity that he claims under the Act of Parliament, he must at least shew that he has conformed to the conditions of the Act of Parliament, and he claims to have done so, and says that he comes under s. 21 of the Public Health Act, 1875. [His Lordship read the section.] He says: "True it is I did not consult this local authority upon the matter at all; I knew, or might have known" (because it was in evidence), "that in this small community other persons had tried to make these communications, and assent had been refused. I did not ask the authority for permission, and I had no reason to suppose that they would assent to it. The statute obliges me to give them notice. I did not do it, and yet I claim immunity under the statute for creating an intolerable nuisance on the land of the plaintiff." That seems a strong measure, and, in order to bring himself within the section, the appellant has first of all to shew that the channel into which he has sent this fæcal matter is a sewer of the local authority. Mr. Glen's contention goes to this extent—that if a highway drain had been made simply for the purpose of collecting rain water to be used for drinking purposes, afterwards, and although there was an efficient system for dealing with fæcal matter in the neighbourhood, he might nevertheless pass his fæcal matter down into this channel. That seems an extravagant construction of the statute, and one which I should shrink from unless driven to it by the absolute wording of the section.

Although this may be a drain which comes within the definition of a sewer under the Act, I think that it was not this class of sewer to which the provisions of the Public Health Act, enabling any person to pass the fæcal matter of his household into it, apply. I do not think it is necessary to decide that as a matter of law (though I should certainly be very reluctant to throw any doubt upon the views taken by the learned judges of the Divisional Court on this question), because the point does not arise in this case for this reason—that even if this were a sewer into which the appellant had a right under the

conditions of the statute to pass fæcal matter, he has not performed those conditions. Therefore, it seems to me that he stands naked against the plaintiff's claim.

On these grounds I think that the appeal should be dismissed.

Solicitors: *Ullithorne, Currey & Jennings, for C. B. Hodgson, Carlisle; Chester & Co., for Wright, Brown & Strong, Carlisle, and for I. H. Mawson, Carlisle; Foulger, Robinson & Miller, for H. F. Leavers, Carlisle.*

H. B. H.

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## *In re* CARY AND LOTT'S CONTRACT.



[1901 C. 1379.]

*Land—Administration—Transfer to Devisee—Charge for Payment of Moneys for which the Personal Representatives are Liable—Liability of Personal Representatives for Unknown Debts—Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *s.* 2, *sub-ss.* 2, 3; *s.* 3, *sub-s.* 1—*Law of Property Amendment Act*, 1859 (22 & 23 *Vict. c.* 35), *s.* 29.

The charge provided by sub-s. 1 of s. 3 of the Land Transfer Act, 1897, does not extend to debts for which prior to the commencement of that Act the personal representatives of the debtor would not be liable as regards the personal estate; and, therefore, where the personal representatives have given the usual statutory notices to creditors, the charge does not apply to debts of which they have no notice at the date of the conveyance to the devisees.

THIS was a vendor's summons under the Vendor and Purchaser Act, 1874.

By his will, made in 1878, R. S. S. Cary devised certain freehold estates (including the property now in question) to trustees with a power of sale, to hold the same upon trust for several persons in strict settlement. The testator died on September 2, 1898. In December, 1898, the executors published the usual statutory notice to creditors to send in particulars of their claims, and prior to September, 1899, they had paid or provided for all claims on the testator's estate of which they had notice. More than a year after the testator's death the executors were called upon by the devisees in trust of the real estate to convey the said real estate to them, and this was

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effected by a conveyance, dated September 29, 1899, which contained a declaration that the property was granted "subject to a charge for the payment of any money which the personal representatives of the testator are liable to pay." In February, 1901, the trustees agreed to sell a portion of this property, and requisitions were delivered by the purchaser.

The eighth requisition, after referring to the charge contained in the conveyance of September 29, 1899, continued as follows: "The vendors must give to the purchaser proper indemnities against all the outstanding debts and liabilities of the testator and all moneys which at the date of the said conveyance the representatives were liable to pay, and which moneys still remain unpaid or unsatisfied."

The vendors in reply stated that they had no notice of any liability affecting the property, and declined to give an indemnity.

The purchaser then made the following further requisition: "Having regard to the form of the charge mentioned in the requisition, the purchaser insists on the vendors giving an indemnity in respect of claims against the testator's estate of which the executors had no notice at the date of the conveyance of 29th September, 1899."

Thereupon the vendors took out this summons for a declaration that the eighth requisition and further requisition had been sufficiently answered by the vendors, and that the purchaser was not entitled to an indemnity in respect of claims against the estate of R. S. S. Cary, deceased, of which his executors had no notice at the date of the conveyance.

The question turned upon the construction of ss. 2 and 3 of the Land Transfer Act, 1897 (1), in conjunction with s. 29

(1) Sub-s. 2 of s. 2 of the Land Transfer Act, 1897, provides as follows:—

"All enactments and rules of law . . . . as respects the payment of costs of administration and other matters in relation to the administration of personal estate, and the powers, rights, duties, and liabilities of personal representatives in respect of personal estate, shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real vesting in them or him," save as therein mentioned.

Sub-s. 3 provides that, "in the administration of the assets of a person dying after the commencement of this Act, his real estate shall be administered in the same manner, subject to

of the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35). (1)

*Warrington, K.C.*, *Arthur J. Mackey*, and *Mark Romer*, for the vendors. The question is whether this land is subject to a charge for debts and liabilities of which at the date of the execution of the conveyance the executors had no notice, and for which under the Law of Property Amendment Act, 1859 (Lord St. Leonards' Act), they would not be liable. The scheme of the Land Transfer Act, 1897, is that for the purposes of administration real estate is to be placed on the same footing as personal estate before the Act: see s. 2, sub-ss. 2 and 3. Sub-s. 2 provides that all enactments relating to (amongst

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the same liabilities for debt, costs, and expenses, and with the same incidents, as if it were personal estate" (subject to certain exceptions).

Sub-s. 1 of s. 3 provides as follows:—

"At any time after the death of the owner of any land, his personal representatives may assent to any devise contained in his will, or may convey the land to any person entitled thereto as heir, devisee, or otherwise, and may make the assent or conveyance, either subject to a charge for the payment of any money which the personal representatives are liable to pay, or without any such charge; and on such assent or conveyance, subject to a charge for all moneys (if any) which the personal representatives are liable to pay, all liabilities of the personal representatives in respect of the land shall cease, except as to any acts done or contracts entered into by them before such assent or conveyance."

(1) Sect. 29 of the Law of Property Amendment Act, 1859, provides as follows:—

"Where an executor or administrator shall have given such or the like notices as in the opinion of the Court in which such executor or administrator is sought to be charged would have been given by the Court of Chancery in an administration suit, for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, such executor or administrator shall, at the expiration of the time named in the said notices or the last of the said notices for sending in such claims, be at liberty to distribute the assets of the testator or intestate or any part thereof amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets or any part thereof so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of distribution of the said assets or a part thereof, as the case may be; but nothing in the present Act contained shall prejudice the right of any creditor or claimant to follow the assets or any part thereof into the hands of the person or persons who may have received the same respectively."

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other things) the liabilities of personal representatives in respect of personal estate shall apply to real estate so far as the same are applicable, and sub-s. 3 provides that the administration of real estate shall be subject to the same incidents as if it were personal estate. Amongst the enactments relating to the liability of personal representatives in respect of personal estate is the Law of Property Amendment Act, 1859, which by s. 29 provides that after the personal representatives have given the notices therein prescribed to creditors they shall be at liberty to distribute the estate without being liable to any creditors of whose claim they shall not have had notice at the date of distribution. That enactment, therefore, applies now to the administration of the real estate.

Further, it cannot be disputed that, apart from the Land Transfer Act, 1897, where a devisee alienates land for value the purchaser takes it free from the debts of the testator: *Spackman* v. *Timbrell* (1); *Richardson* v. *Horton* (2): *Pimm* v. *Insall* (3); and where there has been an assent to the bequest the same principle applies to the alienation of leaseholds: *Spackman* v. *Timbrell* (1); and of pure personalty: *Dilkes* v. *Broadmead.* (4) Then what is the effect of the charge in the conveyance of September 29? That charge follows the language of s. 3 of the Land Transfer Act, 1897, and is for the payment of any money which the personal representatives of the testator are liable to pay. But after that conveyance, and after giving the statutory notices to creditors, the only moneys which the executor would be liable to pay are debts of which he has notice, and those have been paid or provided for. Therefore the charge can have no operation in this case, and there is nothing for which an indemnity is required.

*T. H. Carson, K.C.*, and *Greenland*, for the purchaser. This question turns upon the construction of the charge in the conveyance to the devisees in trust. The question is, what moneys were the executors liable to pay at the date of the conveyance? We say they were liable to pay every debt of the testator. By s. 29 of the Law of Property Amendment

(1) (1837) 8 Sim. 253.
(2) (1843) 7 Beav. 112.
(3) (1849) 1 Mac. & G. 449, 458.
(4) (1860) 2 D. F. & J. 566.

Act, 1859, up to the time of distribution the executors remain liable for all claims against their testator's estate, whether known or unknown, and their immunity in respect of unknown claims only arises after distribution; so that even if that provision is imported the executors' immunity is not imported, because it does not arise until after distribution. The theory of the Land Transfer Act, 1897, is this: that the creditor, whether known or unknown, is to have a continuous security. Until conveyance the security is the liability of the personal representatives, and after conveyance it is the real property itself. The Act has put the legal estate into the legal personal representatives, which they are bound to use for the payment of debts; and when the land is parted with the land is liable in the hands of the purchaser. This is an Act passed for the benefit of creditors. It is said that this Act is passed to assimilate the administration of real estate to that of personal estate; but there are two differences: first, the mode of conveyance is different; and, secondly, s. 3 of the Act refers to all liabilities of the personal representatives whether known or not.

*Warrington, K.C.*, in reply. The charge is for the benefit of the executors, and it is optional on them whether they will require it or not. The liability of the executors for unknown debts ceases on the execution of the conveyance; and, therefore, there being here no liability, the charge can have no effect.

*Cur. adv. vult.*

June 13. KEKEWICH J. (after stating the facts). It is admitted that the estate has been fully and properly administered, and that there remains unpaid no debt of the testator of which the executors have had notice. The purchaser's objection is that there may be other debts of which the executors have not had notice, and that by reason of the charge contained in the deed of conveyance these debts, if any, are an incumbrance on the freeholds. That the purchaser is willing to accept an indemnity is of no moment, the real objection being that there is or may be a charge on the property, and that this is a blot on the title. It is beyond doubt that such an objection,

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if made with regard to freeholds devised by the will of a testator dying before January 1, 1898 (the day when the Land Transfer Act, 1897, came into operation), would have been untenable, and I approach the consideration of that Act with a strong and, I believe, thoroughly sound opinion that I ought not to regard it as altering a settled rule of law and disturbing the recognised practice of conveyancers unless convinced that this alteration is clearly expressed or is so necessarily implied in the provisions of the Act that it is impossible to give reasonable effect to those provisions on any other footing. The neat question, then, is whether, if it be hereafter discovered that there are debts unpaid of which the personal representatives of the testator have no notice, such debts will be money charged on the freeholds. I have thus stated the question because, although the deed says generally "any money which the personal representatives are liable to pay," yet it being common ground as above mentioned that there is nothing now remaining unpaid to the knowledge of the executors, that is really what I have to decide. Study of the Act for the purpose of determining this particular question has disclosed numerous and great difficulties of construction and of the application to the new statutory provisions of old rules; and, having regard to these difficulties and to the danger of indicating an answer to any question which has not been argued, and the equal danger of suggesting questions which, after all, may not require solution, I think it better to decide the point actually before me on as simple grounds as circumstances permit, and with a statement of as few reasons as are compatible with judicial decision. The Act undoubtedly introduces a new element into the administration of estates in making real property assets for the payment of debts. That this is so is clear from sub-s. 3 of s. 2. The same sub-section says that real estate shall be administered in the same manner, subject to the same liabilities for debt, costs, and expenses, and with the same incidents as if it were personal estate. There is nothing here making the executors liable for moneys for which they would not otherwise have been liable, but only the assets available for satisfaction of the liabilities are increased, and it is reasonable to conclude that if, apart from this increase of

assets, the executors are under no liability, such increase was not intended to create one. Before considering whether under such circumstances as we have here there is any liability on the part of the executors, it is well to notice s. 3, because it justifies the language of the conveyance making the freeholds subject to a charge for any money which the personal representatives are liable to pay. Those are the words of the Act, and they have been taken from the Act and put into the conveyance. One, therefore, looks at the Act for an indication of what was intended to be charged; but observe that the Act only permits the conveyance to be made subject to a charge, leaving it optional to the executors whether they will require that or not, and in consequence it is the conveyance, and not the Act, which creates the charge, if any there be. I do not think s. 3 in any way helps one to determine what the charge is. Prior to the Act 22 & 23 Vict. c. 35, an executor remained liable to creditors notwithstanding all precautions on the executor's part and want of notice of claims, and, indeed, absolute safety could only be obtained under an administration judgment. That Act, however, provided (s. 29) that where an executor has given notices such as would have been directed by the Court in an administration suit, then at the expiration of the time named in such notices he shall be at liberty to distribute the assets, and shall not be liable for the assets or any part thereof so distributed to any person of whose claim such executor shall not have had notice at the time of the distribution of such assets or part thereof, as the case may be. In this case the executor has given notices of the character contemplated by the Act, and they are, in my opinion, such as would have been given by the Court in an administration suit. Therefore, so far as the personal estate is concerned, the executors remain under no liability if they distribute the assets on the footing of there being no claims of which they have not received notice. Applying this as, having regard to s. 2, sub-s. 3, of the Land Transfer Act, 1897, I ought to apply it, to real estate, the exemption from liability is complete also as regards that. But it remains to be observed that s. 29, just quoted, concludes with a proviso that nothing in that Act contained shall prejudice the

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right of any creditor or claimant to follow the assets or any part thereof into the hands of the person or persons who may have received the same respectively. If the result of the two Acts together is, as regards real estate, merely to exempt the executor from liability, but to leave the real estate charged, the purchaser's objection still stands good; but, as already stated, real assets could not have been followed in the hands of a purchaser before the Land Transfer Act, 1897, and there is nothing in that Act to create a right in creditors to follow them. The proviso to s. 29 of 22 & 23 Vict. c. 35, is not, therefore, applicable to real estate, the law respecting which is in this particular intact. I will declare as asked by the summons that the eighth requisition and further requisition of the purchaser have been sufficiently answered by the vendors, and that the purchaser is not entitled to any indemnity in respect of claims against the testator's estate of which the executors had no notice at the date of the conveyance, and the purchaser must pay the costs.

Solicitors: *Robbins, Billing & Co., for A. H. Dymond, Exeter; Wood, Bigg & Nash, for Kitsons, Mackenzie & Hext, Torquay.*

H. B. H.

## *In re* REDMAN. WARTON *v.* REDMAN.

[1900 R. 1885.]

KEKEWICH J.

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*June* 19.

*Friendly Society—Policy not Assignable otherwise than by way of Nomination —Friendly Societies Act*, 1875 (38 & 39 *Vict. c.* 60), *s.* 15—*Friendly Societies Act*, 1896 (59 & 60 *Vict. c.* 25), *ss.* 56, 57.

Policies effected under the Friendly Societies Acts, 1875 and 1896, are not assignable otherwise than by nomination under the Acts.

So *held*, following decision of Phillimore J. in *Caddick* v. *Highton*, (1899) 68 L. J. (Q.B.) 281; 80 L. T. 527; 47 W. R. 668; 15 Times L. R. 182 (see Note, post, p. 476).

ADJOURNED SUMMONS.

Joseph Henry Redman, the testator in this action, was, at the date of his death, the holder of two policies of insurance on his life effected by him with the Brighton and Sussex Mutual Provident Society, which was a society registered under the Friendly Societies Acts. The policies were for 100*l.* each, Nos. 5397 and 6069, issued in 1876 and 1881 respectively.

The policies expressed on their face that the society was a friendly society for sickness and life assurances, endowments, and annuities, and certified that the testator was a member thereof assuring for the benefits thereunder mentioned, subject to the regulations and payments expressed in the rules and tables duly certified according to law for the government of the society.

The rules of the society, so far as material, were to the following effect: Rule 40 provided for granting to persons above ten years of age insurances on their own lives for any sum not exceeding 200*l.* according to the tables therein mentioned; and rule 43 provided that any member not being under the age of sixteen years might, by writing under his or her hand, delivered at or sent to the registered office of the society, nominate any person (subject to certain exceptions) to receive any moneys payable by the society on the death of such member not exceeding 100*l.*

In July, 1900, the testator deposited these two policies,

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together with certain title-deeds, with the solicitors of Mrs. Elizabeth Beatrice Frost to secure a loan from her of 200*l.*, and this deposit was accompanied by a formal letter to the solicitors announcing that the testator had sent them the policies with certain bonus certificates, and also the title-deeds.

The testator died on October 9, 1900, having by his will, dated March 12, 1877, appointed his widow, the defendant Ellen Redman, sole executrix thereof, and she duly proved the same on November 2, 1900.

This action was brought by a creditor of the testator for the administration of the testator's real and personal estate, and on November 19, 1900, the usual administration judgment was pronounced. The testator's estate proved to be insolvent.

The moneys payable on the death of the testator in respect of the policies (including bonuses thereon) were paid into court by the society under an order made in the action, and were now represented by the sum of 307*l.* 15*s.* 1*d.* New Consols in court to the credit of the action, "Account of moneys under policies numbered 5397 and 6069 in the Brighton and Sussex Mutual Provident Society."

Mrs. Frost claimed payment of her debt out of these moneys. This claim was resisted by the executrix, and the present summons was taken out by her for a declaration that the moneys formed part of the personal estate of the testator.

Mrs. Frost had not been nominated by the testator under rule 43 of the rules of the society as the person to receive the policy moneys, nor did it appear that any nomination had been made by him pursuant to the rules of the society.

*G. Broke Freeman*, for the executrix, in support of the summons. Policies issued by friendly societies under the Friendly Societies Acts are the creatures of statute, and upon the true construction of those Acts are not assignable in law inter vivos otherwise than by nomination pursuant to the Acts. This point was expressly so decided on February 1, 1899, by Phillimore J., in the case of *Caddick* v. *Highton*. (1)

(1) 68 L. J. (Q.B.) 281; 80 L. T. 527; 47 W. R. 668; 15 Times L. R. 182; post, p. 476, n.

*Bennett* v. *Slater* (1) is not expressly in point, but in that case the Court of Appeal recognised the statutory character of these instruments, by holding that a nomination cannot be revoked by will, but only in the way prescribed by statute. It follows from the decision in *Caddick* v. *Highton* (2) that the attempted assignment in favour of Mrs. Frost was ineffectual, and, as no nomination in her favour was made by the testator, her security is bad, and the policy moneys form part of the testator's general estate available for payment of all his creditors.

*Eastwick*, for the claimant, Mrs. Frost. It is submitted that the assignment is valid. The true view of the Friendly Societies Acts is that they contemplate assignment of these policies. By the Friendly Societies Act, 1896, s. 106, the expression "persons claiming through a member" is to include the nominees of the member where nomination is allowed. The inclusion of the nominees shews that the expression is to be construed in the ordinary way, and, therefore, as including assigns; and this is made clear by a comparison with s. 4 of the Act of 1875, where the same expression is defined as including "the heirs, executors, administrators and assigns of a member, and also his nominees where nomination is allowed." In previous legislation the same recognition of assignment is found, and there is nothing whatever in the language of any of the Acts which expressly or by clear implication excludes assignment. Neither *Caddick* v. *Highton* (2) nor *Bennett* v. *Slater* (1) is an applicable authority in the present case, because in each of those cases there was a nomination, and the title of the nominee was upheld; whereas in the present case there was no nomination, and the Court is asked to decide as to the legal effect of an ordinary assignment of a policy. The decision in *Caddick* v. *Highton* (2), so far as this point is concerned, was based upon the special rule of the particular society. The judgments in *Bennett* v. *Slater* (1) tend to shew that where there is a nomination the general law is only excluded pro tanto, and that therefore, where there is no nomination, the general law takes effect.

*Rooke*, for general creditors.

(1) [1899] 1 Q. B. 45.
(2) 68 L. J. (Q.B.) 281; 80 L. T. 527; 47 W. R. 668; 15 Times L. R. 182; post, p. 476, n.

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KEKEWICH J., after an expression of regret that the case of *Caddick* v. *Highton* (1) had not been reported in the *Law Reports*, continued as follows:—That case was heard by Phillimore J. in the year 1899. It appears to have been fully argued by eminent counsel on both sides, and the judgment, which was apparently not written but delivered at the close of the arguments, bears upon the face of it evidence that full consideration was given to the arguments addressed to the Court. The case is reported in 68 L. J. (Q.B.) 281, and in 80 L. T. 527. Both reports are full; they are almost, though not entirely, on the same lines, and it is mainly because of the discrepancy between them that I regret that the case has not found its way into the *Law Reports*.

The point for which the case has been cited is that Phillimore J. is said to have held that policies created under the Friendly Societies Acts of 1875 and 1896 are not assignable otherwise than by nomination as provided by the Acts. The point, which was distinctly raised in argument, was not a by-point, and what was said by the learned judge cannot possibly be treated as obiter dictum, or as not necessary for the purposes of the case before him. Mr. Montague Lush, for the plaintiff, is reported in the *Law Times* (and the report in the *Law Journal* is to the same effect) to have contended that "policies under the Friendly Societies Acts come under the general law, and are assignable by deed under the Policies of Assurance Act, 1867. The plaintiff is therefore entitled as executor of the assignee." In answer to that Mr. Asquith is reported as saying that "under the Friendly Societies Acts, 1875, s. 15, and 1896, ss. 56, 57, policies are not assignable otherwise than by nomination as provided by the Acts." The point therefore was distinctly before the learned judge, and, according to the two reports to which I have referred, he decided it quite plainly, and without any hesitation or qualification. The reason why I am dwelling upon this is because Mr. Eastwick has pointed out that the learned judge referred to the bargain between the parties, and about that there is a question upon the language of the reports which have been referred to. In the *Law Times* the

(1) 68 L. J. (Q.B.) 281; 80 L. T. 527; 47 W. R. 668; 15 Times L. R. 182; post, p. 476, n.

learned judge is made to say this: "I am of opinion that such a policy cannot be assigned, and that the agreement between the society and the person assuring is the bargain which is set out in rule 17 of the society's rules." The rule is set out in the report, as also in the report in the *Law Journal*; but in that report the learned judge is made to express himself somewhat differently: "The first point is an extremely important one, and upon it my opinion is in favour of the defendants, the society. I do not think that these policies can be assigned. I think that the bargain is the bargain expressed in clause 1 of rule 17." According to the report in the *Law Journal*, though he notices the bargain in the rules, he does not connect it so immediately with the point of law as to make the point of law depend on the bargain. In the report in the *Law Times* he connects them as though the two depended on each other. That is important, because here I have no similar rule. I have studied the reports, and I do not think that Phillimore J. meant that the rule affected the conclusion at which he had arrived. I regard him as deciding the neat point that a policy effected under the Friendly Societies Acts is not assignable otherwise than by nomination under the Acts.

I observe, however, that the case is reported also in *The Times* Law Reports, vol. xv. p. 182. The report is shorter than the other two, and the rule of the society is not set out, but the reporter has neatly and usefully expressed the conclusion of the judge in these words: "Phillimore J. held that the intention of the Legislature to be gathered from the above sections was that these policies should not be assignable except in the manner laid down in the statutes, and that from motives of public policy they should not be otherwise alienable." That is, no doubt, a mere paraphrase of what the learned judge said, the other reporters having given his words more fully; but it seems to me to express exactly what Phillimore J. intended to decide. He did, no doubt, refer to *Bennett* v. *Slater* (1), but not on this particular point, but on another point with which I am not now concerned. I think I am right in saying that the point was a new one when it first came before Phillimore J.

(1) [1899] 1 Q. B. 45.

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He decided it conclusively nearly two and a half years ago. What is my duty? The matter is of great importance to friendly societies and their members, and to others who may have dealings with them. I think on the whole it is better for me not to go further, and not to say that I agree or disagree with the decision in *Caddick* v. *Highton*. (1) I must not be understood in any way to express an opinion of my own. I find here an express decision on the point before me, and I think it is my duty simply to follow that decision.

Solicitors: *Keith & Humphries; Rooke & Sons; Black & Moss; Champion, Sons & Hart, Brighton.*

(1) 68 L. J. (Q.B.) 281; 80 L. T. 527; 47 W. R. 668; 15 Times L. R. 182; and below.

NOTE.

Feb. 1, 1899.

CADDICK *v.* HIGHTON AND OTHERS.

ACTION tried before Phillimore J.

The plaintiff claimed to recover from the defendants, as trustees of the Liverpool Victoria Legal Friendly Society, 100*l.* under a policy of life insurance effected with the society. The society was duly registered under the Friendly Societies Acts.

The following facts were proved or admitted at the trial:—

On November 12, 1881, Mary Gorton effected the policy in question on her life for 100*l.* at a monthly premium of 15*s.* 6*d.*

By deed, dated April 25, 1887, Mary Gorton assigned the policy to Joseph Caddick absolutely, and all moneys to be payable thereunder, and the full benefit thereof. The consideration for the assignment was expressed to be 10*l.* Notice of that assignment was duly given to the society.

On July 8, 1887, Mary Gorton duly nominated in writing, according to the form issued for that purpose under the Friendly Societies Acts, Joseph Caddick as the person to receive the policy moneys.

Joseph Caddick died on March 18, 1891, having appointed the plaintiff, Edward Caddick, executor of his will.

Mary Gorton died on November 14, 1896.

From Joseph Caddick's death until after the death of Mary Gorton the plaintiff regularly paid and took receipts for the premiums payable under the policy, in the belief that the policy moneys were due to Joseph Caddick's estate under the assignment. On becoming aware of Mary Gorton's death the plaintiff brought this action.

Rule 17 of the society's rules provided:—

"Persons becoming members of the society, and complying with the rules, and paying the subscriptions according to the table of insurance, will entitle their nearest kin, executors, administrators, or legal nominees to receive at death any sum for which they may be insured, the same not to exceed 200*l.*"

The defendants pleaded that the assignment was only intended to be operative in case Mary Gorton pre-

deceased Joseph Caddick; that it was revoked by the subsequent nomination in favour of Joseph Caddick; that as Joseph Caddick died during the lifetime of Mary Gorton, his rights and interests under the nomination were extinguished, and that the policy was not transferable either at law or in equity.

The Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), enacts (s. 56, sub-s. 1): "A member of a registered society (other than a benevolent society or working men's club) or branch thereof, not being under the age of sixteen years, may, by writing under his hand delivered at or sent to the registered office of the society or branch, or made in a book kept at that office, nominate a person to whom any sum of money payable by the society or branch on the death of that member, not exceeding one hundred pounds, shall be paid at his decease."

Sub-s. 4: "A nomination so made may be revoked and varied by any similar document under the hand of the nominator, delivered, sent, or made as aforesaid."

Sect. 57, sub-s. 1: "On receiving satisfactory proof of the death of a nominator, the society or branch shall pay to the nominee the amount due to the deceased member, not exceeding the said sum of one hundred pounds."

A similar power of nomination of sums not exceeding 50*l.* is contained in the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), s. 15, sub-s. 3.

*Montague Lush* (*E. A. Jelf* with him), for the plaintiff.

*Asquith, Q.C.* (*Broadbridge* with him), for the defendants.

[*Bennett* v. *Slater*, [1899] 1 Q. B. 45; *Attorney-General* v. *Abdy*, (1862) 1 H. & C. 266, and *In re William Phillips' Insurance*, (1883) 23 Ch. D. 235, were referred to during the hearing of the case.]

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PHILLIMORE J. In this case the plaintiff claims to be entitled to the policy moneys, first, under the assignment as being the executor of Joseph Caddick who was the assignee, and, secondly, in the alternative, because Joseph Caddick was a nominee of the assured, and although he died in her lifetime she never revoked her nomination, and the plaintiff is the personal representative of the nominee and stands in his stead. Upon the first point my opinion is in favour of the defendants. I do not think that these policies can be assigned. I think that the bargain between the parties is the bargain expressed in the 17th rule of this society—namely, that upon death the next of kin, the executors, the administrators, or the legal nominees of the assured, and those only, shall be entitled to be paid. It is, in my view, clear that the expression "legal nominee" means the nominee according to law under the special provisions of the Friendly Societies Acts. I do not think the Legislature intended that these policies should be assigned. I see no way to get rid of the express provisions of s. 15, sub-s. 3, of the Friendly Societies Act, 1875, and s. 56, sub-s. 1, of the Friendly Societies Act, 1896. I think the society must pay the nominee. If there were both an assignment and a nomination, and the society paid the assignee, they would have to pay over again to the nominee, and that is a strong indication that the Legislature did not intend the policies to be assignable. I can well conceive grounds of public policy for it, and I can conceive that the Legislature, having given, amongst other

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privileges, this special privilege of nomination in respect of these policies of insurance, intended to limit their effect, and make them not assignable. I think, also, I am justified in laying stress upon the express exception of them from the Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), the general Act enabling assignees of policies of life assurance to sue thereon in their own names, and I am inclined to think that the judgments of the Court of Appeal in *Bennett* v. *Slater*, [1899] 1 Q. B. 45, assist one in coming to the same conclusion.

If that be so, the plaintiff must fall back upon his title as representative of the nominee—a lesser title than under the assignment because he is liable to be divested of it at any time by a revocation in proper form by the nominator. It was contended by counsel for the plaintiff that the title of the nominee or his representative could only be divested in that way, and the language of the Court of Appeal in *Bennett* v. *Slater*, [1899] 1 Q. B. 45, seems to me to point strongly to that conclusion. I think that these powers of nomination are closely analogous to a power of appointment by deed. A similar power of nomination is given in the rules for the management of the Customs Annuity and Benevolent Fund, though it is a more restricted power, because the directors of the fund may refuse to accept the nominee. The two cases cited, which were decided with respect to that fund, point strongly in the same direction. In one of them—*Attorney-General* v. *Abdy*, 1 H. & C. 266—the Court held that an appointment by will under the rules gave a succession for the purposes of succession duty. I cannot see why the estate of a nominee, who dies before the nominator, should be deprived of the benefit intended to be conferred by the nominator, even although his death may be unknown to the nominator. Counsel for the defendants relied on the words of the rule as indicating an intention that the society should pay the nominee only in all cases. I do not see anything in the wording of the rule to prevent the policy money being due to the legal personal representative of the nominee. I therefore decide this case in favour of the plaintiff.

*Judgment for the plaintiff.*

Solicitors for plaintiff: *Needham, Tyer & Barrow*, for *Edward Caddick*, West Bromwich.

Solicitor for defendants: *J. Tickle.*—W. A.

C. C. M. D.

## LADY CARDIGAN *v.* CURZON HOWE.

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*June* 29; *July* 3, 4, 6.

[1869 C. 30.]

*Estate Tail—Will—Limitations of Real Estate—Disentailing Deed—Estates "in defeasance of" Estate Tail—Fines and Recoveries Act*, 1833 (3 & 4 *Will.* 4, *c.* 74), *s.* 15—*Future Rights—Unascertained Persons—Representation—Trustees.*

A testator devised and bequeathed his real and personal estate unto and to the use of trustees, upon trusts for the benefit of his wife for life; from and after her death, the surplus rents were to be accumulated for the purpose of paying off mortgages on the real estates; and upon the expiration or other determination of the period of accumulation, but subject to the life interest of the wife, the trustees were directed to convey the real estates to the use of G. in tail male; but if G. should be then dead, to the use of the person who should then be the first heir male of the body of G., with remainder to the use of the person who for the time being should be entitled to the dignity and title of Earl of Cardigan in tail male, with remainder to the use of the testator's right heirs. By a codicil the testator revoked the devise of the estate tail to G., and devised the said estates, after the death of his wife, to R. in tail male, "with all the limitations as in my said will mentioned." R., with the consent of the wife, as protector of the settlement, had executed a disentailing deed of 100,000*l.* Consols in court, representing proceeds of sale of the settled estates, and the trust for accumulations having now come to an end by the payment off of all the mortgages, R. claimed to be absolutely entitled to this fund, subject to the wife's life interest. On a petition for payment out of this fund by the wife and her incumbrancers with the consent of R.:—

*Held*, that as the petitioners and R. together were claiming immediate relief, on the ground that between them they were now absolutely entitled to this 100,000*l.* Consols, the question was ripe for decision, and the Court had jurisdiction to decide it; and that all necessarily unascertained persons were sufficiently represented by the trustees of the will:

*Held*, also, on the question of construction, that R. was now entitled to a vested equitable estate in tail male in remainder expectant upon the decease of the testator's wife, and that the subsequent estates had been barred by the disentailing deed, being estates to take effect in a certain event after, if not in defeasance of, the vested estate in tail male of R., and that the 100,000*l.* Consols in court could be paid out to the petitioners.

PETITION.

This was an application for payment out of court of a sum of 100,000*l.* Consols, representing proceeds of sale of settled

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estates, which raised a question of construction as to the effect of the limitations of the will of the late Earl of Cardigan, as modified by his second codicil, the question argued being, whether the estates so limited were alternative estates, to take effect on the happening of a particular event, or were estates "in defeasance of" the prior estate, which could be effectually barred by a disentailing deed under s. 15 of the Fines and Recoveries Act, 1833. The will, so far as material for the purposes of this report, was as follows (1):—

By his will, dated May 24, 1866, the late Earl of Cardigan devised and bequeathed his real and personal estate unto and to the use of trustees, upon trust to permit the Countess to inhabit the mansion-house and park during her life, to manage the said estates, and out of the rents to pay costs of management, to keep down the interest on mortgages, and pay the surplus to the Countess for her life. And after her death he directed his trustees, during two lives, there named, and the life of the survivor and twenty years afterwards, to accumulate the surplus rents upon trust, at the end of the period of accumulation, to apply the same in paying off mortgages and other charges on the estates: and upon the expiration or other determination of the period of accumulation, but subject and without prejudice to the trusts thereinbefore declared for the benefit of his said wife for her life, the trustees were directed to convey and assure the real estates in the several counties of Northampton, Leicester, and York, or any of them, so that the same should stand limited, settled, and assured to the use of George William Thomas Bruce (afterwards fourth Marquis of Ailesbury) in tail male, but if the said George William Thomas Bruce should be then dead, then to the use of the person who should then be the first heir male of the body of the said George William Thomas Bruce in tail male, with remainder to the use of the person who for the time being should be entitled to the dignity and title of Earl of Cardigan in tail male, with remainder to the use of the testator's right heirs for ever. On October 17, 1867, the testator made a second

(1) A fuller statement of the earlier part of this will is given in *Cardigan* v. *Curzon Howe*, (1885) 30 Ch. D. 531.

codicil to his will as follows: "Whereas I have in and by my last will given and devised all my estates in the counties of Northampton, Leicester, and York (after the death of Lady Cardigan) to George William Thomas, the eldest son of George John Bruce, Esq., the eldest son of Lord Ernest Bruce, in tail. Now I do hereby revoke and make void the said devise by me made to the said George William Thomas Bruce, and I do hereby give and devise my said estates in the counties of Northampton, Leicester, and York, after the death of Lady Cardigan, to my godson Robert Thomas Bruce, fourth son of Lord Ernest Bruce in tail male, with all the limitations as in my said will mentioned." In all other respects he confirmed his said will.

The testator died in March, 1868. The Countess of Cardigan had created divers mortgages and charges on her life interest under her late husband's will. Portions of the settled estates had from time to time been sold, and the proceeds had been paid into court and invested in Consols. By an indenture dated February 20, 1901, and duly enrolled as a disentailing assurance, Lord Robert Bruce, being the same person as the Robert Thomas Bruce mentioned in the second codicil, purported, with the consent of the Countess of Cardigan as protector of the settlement made by the will and codicil, to disentail 100,000*l.* of the Consols in court, and by another indenture of April 19, 1901, he and Lady Cardigan, in exercise of a joint power of appointment reserved to them by the disentailing deed, with the consent of some of her incumbrancers, appointed this 100,000*l.* to certain trustees upon trusts not material for the purposes of this report. Lady Cardigan, her incumbrancers, and these trustees now petitioned for payment out of court of this sum. The mortgages on the testator's real estates were practically all paid off, or could be provided for out of the funds left in court, so that for the purposes of this application the trust for accumulations was treated as being at an end, with the result that if Lord Robert Bruce had, as he claimed to have, a vested estate in tail male, it could be turned into an absolute estate by the disentailing deed, and this 100,000*l.* Consols could, with his consent and

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that of Lady Cardigan and her incumbrancers, now be dealt with by the trustees.

*Rowden, K.C.*, and *Cyprian Williams*, for the petitioners. By the joint operation of the will and second codicil, Lord Robert Bruce is now entitled to a vested equitable estate in tail male, not contingent in any way, but expectant on the determination of the trusts for Lady Cardigan's benefit, and the trust for accumulation, which must now be taken to be at an end: as to the subsequent limitations, there are no words in the second codicil to confer an estate on the person who shall be the first heir male of Robert, in substitution for the gift in the will to the first heir male of George; the gift to the first heir male of George was a substitutional gift, and the gift in favour of George himself, having been revoked by the codicil, the gift in favour of the person who shall be his first heir male is impliedly revoked also, and therefore the next limitation after Robert's estate in tail male is the remainder to the Earl of Cardigan for the time being in tail male, and this remainder has been effectually barred by the disentailing deed. But supposing there is a gift over, if Robert should be "then" dead, to the person who should then be his first heir male, this gift over is a limitation "in defeasance of" Robert's estate tail, which can also be barred under the Fines and Recoveries Act, 1833, s. 15 (1); *Milbank* v. *Vane*. (2) The trust for accumulations being now at an end, there is no longer

(1) Sect. 15 of 3 & 4 Will. 4, c. 74, enacts: "That after the 31st day of December, 1833, every actual tenant in tail, whether in possession, remainder, contingency, or otherwise, shall have full power to dispose of for an estate in fee simple absolute, or for any less estate, the lands entailed, as against all persons claiming the lands entailed by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous Act would have been vested in or might have been claimed by, the person making the disposition, at the time of his making the same, and also as against all persons, including the King's Most Excellent Majesty, his heirs and successors, whose estates are to take effect after the determination or in defeasance of any such estate tail; saving always the rights of all persons in respect of estates prior to the estate tail in respect of which such disposition shall be made, and the rights of all other persons, except those against whom such disposition is by this Act authorized to be made."

(2) [1893] 3 Ch. 79.

any contingency. Lord Robert's estate tail has been turned into an absolute estate by the disentailing deed, and he and Lady Cardigan, with the consent of their incumbrancers, can now deal with this 100,000*l.* as they please, and are entitled to have it paid out to the trustees of the deed of April 19, 1901.

*Levett, K.C.*, and *Dighton Pollock*, for Lord Robert Bruce, supported the application for payment out, and adopted the argument of the petitioners. The estate tail is now vested; the estate given by the codicil was not cut down by the inaccurate reference made in the codicil to the limitations contained in the will. The revocation by the codicil of the gift to George, revoked the executory limitations as well: *Boulcott* v. *Boulcott* (1); Theobald on Wills, 5th ed. p. 655. Robert, therefore, has a vested estate in tail male expectant on the death of Lady Cardigan.

*Frobisher Mills*, for Lady Robert Bruce, who had a claim in respect of a jointure, consented to the fund being paid out to the petitioners.

*A. Adams*, for other mortgagees of Lady Cardigan's life estate, and

*H. Fellows*, for mortgagees of Lord Robert Bruce, also consented.

*Norton, K.C.*, and *Hornell*, for the Marquis of Ailesbury, the present Earl of Cardigan. The limitation in favour of the heir male of George, or Robert, as the case may be, is not one to take effect after the determination or in defeasance of Robert's estate tail, but is a limitation to take effect alternatively with the limitation in favour of Robert, according to the event; the period at which the limitations of the will and codicil are to take effect is the death of Lady Cardigan; this is a gift of alternative estates, to take effect on the happening of a particular event. If there are alternative contingencies, as there are in this case, a bar by the tenant in tail under one contingency will not affect the estates to arise upon the other contingency, if the event happened upon which they depended. A case of this kind does not appear to be within s. 15:

(1) (1853) 2 Drew. 25.

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Sugden's Real Property Statutes, 2nd ed. pp. 192, 193. The possibility of limitations of this kind is recognised in *Milbank* v. *Vane* (1), though that was a different case from the present. On the will alone, it is clearly an alternative gift, to take effect on the death of Lady Cardigan; therefore the disentailing deed is not sufficient to defeat the alternative estate tail given to the Earl of Cardigan for the time being. The effect of the codicil is to revoke the contingent estate tail given to George, and to substitute Robert, and it therefore gave to Robert that same contingent estate tail which the testator had previously given to George. All the testator meant to do was to cut out George. For these reasons we say that Lord Robert and Lady Cardigan are not entitled to dispose of this 100,000*l.* Consols.

*T. H. Carson, K.C.*, and *Stallard*, for the trustees of the will, left the matter to the Court, if it was satisfied that all persons interested were before it, or properly represented, and that the question now raised could be decided during the life of Lady Cardigan.

*Rowden, K.C.*, in reply. The codicil in effect creates a new legal devise to Robert in tail male free from any contingency. The direction to the trustees to convey the estates to the tenant in tail male does not affect the date of vesting: *Stanley* v. *Stanley* (2); *Phipps* v. *Ackers* (3); if there is a vested estate tail with an executory limitation over, then this is a defeasance which can be barred under s. 15 by a disentailing deed. The petitioners and Lord Robert are claiming immediate relief, on the ground that together they can make an absolute title to this money; they are entitled to a decision now as to their rights, and the Court has jurisdiction to decide the question here argued as to the nature of Lord Robert's estate during the life of Lady Cardigan. All necessarily unascertained persons are sufficiently represented by the trustees of the will: *Fussell* v. *Dowding*. (4)

*Cur. adv. vult.*

July 6. BYRNE J. As the petitioners and Lord Robert Bruce together are claiming immediate relief, on the ground

(1) [1893] 3 Ch. 79.
(2) (1809) 16 Ves. 491.
(3) (1842) 9 Cl. & F. 583.
(4) (1884) 27 Ch. D. 237, 240.

that between them they can make an absolute title to this 100,000*l.* Consols, I am of opinion that the question of construction which has been raised is now ripe for decision, and that I have jurisdiction to decide it, notwithstanding the fact that Lady Cardigan is still alive. With reference to the other question raised by Mr. Carson, I am of opinion that all necessarily unascertained persons are sufficiently represented by the trustees of the will. I think, however, that the right heir of the testator should be ascertained, and added as a respondent to this petition, and I will give him a fortnight within which to object to any order that is made. As to the construction to be placed on the limitations of the will and second codicil of the late Earl of Cardigan, the question arises in reference to the testator's estates in the counties of Northampton, Leicester, and York, all of which were legally vested in trustees upon the following trusts: [His Lordship then stated the trusts of the will, reading the particular words of the limitations both in the will and in the second codicil, and continued:—] The case falls to be argued upon the footing that the trust for accumulation can never arise, there being ample funds available to discharge and satisfy the only remaining charge or charges. It appears to me that Lord Robert Thomas Bruce is now entitled to a vested equitable estate in tail male in remainder expectant upon the decease of Lady Cardigan. I think that this estate is vested, because there is a present capacity in Lord Robert to take, although it is uncertain whether it can ever take effect in possession; it is therefore not contingent. The next remainder, whether it be to the first heir male of the body of Lord Robert in tail male (George Thomas having died without issue) or to the Earl of Cardigan, is contingent, being dependent upon the death of Lord Robert in the lifetime of Lady Cardigan, there being no present capacity in any person to take, Lord Robert being alive. Lord Robert, having duly disentailed, claims that the assignees (the trustees) of himself and Lady Cardigan are now absolutely entitled in fee simple subject only to Lady Cardigan's life interest. He claims first under a direct legal devise to him in the codicil, which, as I understand, he says supersedes the

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equitable estates given by the will to George, and to the first heir male of George or Robert in a certain event. In my opinion, however, upon the true construction of the will and codicil, the legal estate remains vested in the trustees, and but for the disentailing assurance by Lord Robert the equitable interests would now stand limited in trust for Lady Cardigan for life, with vested remainder to Lord Robert for an estate in tail male, with contingent remainder in the event of Lord Robert dying in the lifetime of Lady Cardigan in favour of the heir male of the body either of George or of Lord Robert (which of them it is not now necessary to decide) with contingent remainder in favour of the Earl of Cardigan for the time being. The next question is what effect, if any, has the disentailing assurance had upon the contingent estates in remainder, and this depends upon the true construction to be placed upon the 15th section of the Fines and Recoveries Act. [His Lordship read the section, and continued:—]

It appears to me that an actual tenant in tail in remainder has disentailed, and has thereby barred his own issue male claiming under the estate in tail male limited to him and his heirs male; he has also barred the contingent estates limited in remainder, if they are to be deemed estates to take effect after the determination or in defeasance of Lord Robert's estate in tail male, but not otherwise. It is argued that the limitation in favour of the heir male of George or Robert as the case may be is not one to take effect after the determination, or in defeasance of Robert's estate tail, but is a limitation to take effect alternatively with the limitation in favour of Robert according to the event, and that consequently it is not barred. The point is new, so far as I know, but I think that the reasoning in support of the contention fails, because the Act does not say after the determination or in defeasance of any estate tail which shall fall into possession, but of any "such" estate tail, i.e., any estate tail in possession or remainder. I think that the estates in question are barred as being estates to take effect in a certain event after, if not in defeasance of, the vested estate in tail male in remainder of Robert. Under these circumstances the money in court may be paid out,

subject to the direction I have already given as to any other interest not sufficiently represented, and subject to providing for the duties.

Solicitors: *G. B. Laurence & Co.; A. R. & H. Steele; Merriman, Pike & Merriman; Warren, Murton & Miller; Hunter & Haynes; Burch, Whitehead & Davidsons; Rooper & Whately.*

W. C. D.

## POWER *v.* BANKS.

[1900 P. 2313.]



*Corporation Sole—Rector—Power to hold Personalty—Mortmain—Irregular Investment in Land—Statute* 13 *Eliz. c.* 10, *s.* 3—*Notice—Trust.*

By statute 31 Geo. 2, c. 2 (private), South Sea Annuities were vested in a rector and his successors as endowment, subject to a provision for sale and reinvestment in land with the consent of the bishop.

Under statute 16 & 17 Vict. c. 23, the annuities were redeemed and the redemption money paid to the then rector on his sole receipt.

A successor having received the redemption money, acting without the consent of the bishop, invested part in land which was conveyed to himself, his heirs and assigns. He resigned and conveyed the land to the next successor, his heirs and assigns. That successor, with his concurrence, sold and conveyed part of the land to the defendant; he subsequently misappropriated the proceeds. The solicitor acting for both parties believed that the land was "church property."

In an action by the present rector against the purchaser:—

*Held*, that:—

(1.) The South Sea Stock being, by the private Act, exceptionally vested in the rector for the time being as a corporation sole, he could, on its conversion, receive and give a good discharge for the money representing it.

(2.) The purchase of the land did not purport to be and was not under the Act, and did not create any trust for the rector as a corporation sole.

(3.) The land was not subject to 13 Eliz. c. 10, and the conveyance to the defendant's vendor was not void under that Act, and was not a breach of trust, there being no beneficiary who could elect to take the land in specie.

(4.) The purchase-money having come to the proper hands, the defendant was not answerable for the subsequent misappropriation of it by his vendor, assuming (which was not decided) that the defendant was not a purchaser for value without notice.

THIS was the trial of an action brought by Mr. Power, the rector of St. Mary, Stratford, Bow, to enforce a claim to have

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certain ground-rents at Lewisham treated as part of his benefice. The defendant, Mr. Banks, had purchased the ground-rents from the plaintiff's predecessor.

By a private Act of Parliament, 31 Geo. 2, c. 2 (1758), it was recited that several sums of money had been appropriated by commissioners for building and inclosing churches in and about the cities of London and Westminster, for the maintenance of the rectors of several new churches, including the church of St. Mary, Stratford, Bow, which sums of money were then represented by specified amounts of South Sea Annuities standing in the books of the South Sea Company in the name of Henry Fane, and that the amount of South Sea Annuities appropriated for the maintenance of the rector of St. Mary, Stratford, Bow, was 3274*l.* 7*s.* 4*d.*

It was enacted that Henry Fane, his executors or administrators, should transfer the several specified principal sums in South Sea Annuities "unto the several rectors for whose benefit the same several principal sums in South Sea Annuities were purchased respectively as aforesaid, and their respective successors, to the intent that the dividends and yearly proceeds of the said several principal sums may be paid to and received by the said several rectors and their successors respectively towards their respective maintenance, but not to be transferred, sold or disposed of unless for such purpose and with such licence and consent as hereinafter mentioned, expressed, provided and declared, and which said annuity stock shall on the death or removal of any of the rectors vest in, and is hereby vested in, the said rectors respectively, and not in the said rector so removed, nor in the executors or administrators of the deceased rector, and shall be carried to the account of such succeeding rectors accordingly in the said company's book for the purposes of this Act."

And it was also "enacted, provided and declared that when and as a proper and convenient purchase or purchases of lands, tenements or hereditaments for the benefit of any of the rectors of the said churches respectively can be found, it shall and may be lawful to and for the rectors of the said churches respectively for the time being, by and with the licence

of the bishop of the diocese or other ordinary of the place for the time being, to be signified in writing under the hand and seal of such bishop or ordinary respectively attested by two credible witnesses, to sell and dispose of the annuity stock vested in each such rector respectively, or any part thereof, at the current price."

It was also enacted "that the money arising and produced by such sale and sales shall from time to time, as and when such sale or sales shall be made, be received by such person or persons as the bishop of the diocese or other ordinary of the place for the time being shall by writing under his hand and seal attested as aforesaid authorize and appoint, and such money as and when the same shall come in and be received shall be laid out and applied in and for the payment of the purchase or consideration money for such lands, tenements or hereditaments so from time to time to be purchased, such purchase being first approved by such bishop or ordinary by writing under his hand and seal attested as aforesaid, and the said lands, tenements or hereditaments shall upon every such purchase thereof respectively be settled, conveyed and assured unto, upon, and to the use of such rector for whose benefit the same shall be purchased respectively and his successors for and towards his and their maintenance for ever. And the said South Sea Company is hereby authorized and empowered to permit and allow such transfers of the said annuity stock so belonging to and vested in the said rectors respectively, or any part or parts thereof, to be made with such licence, consent, and approbation as aforesaid, and are hereby declared not to be obliged to see to or be in anywise answerable for the application of the moneys arising by or from any annuity stock so transferred as aforesaid."

By the South Sea Annuities Commutation Act, 1853 (16 & 17 Vict. c. 23), s. 8, it was enacted, "All persons and bodies politic or corporate interested in the said capital stocks of New South Sea Annuities, Bank Annuities, 1726, and 3*l.* per centum Annuities, 1751, respectively, who shall not signify their assents to accept New 3*l.* 10*s.* per centum Annuities, 2*l.* 10*s.* per centum Annuities, or Exchequer Bonds, upon the

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terms and in the manner herein mentioned, shall, on the 5th day of January, 1854, receive the sum of 100*l.* for every 100*l.* of such capital stock which may be then standing in their respective names, and so in proportion for any greater or less amount; and all persons and bodies politic or corporate interested in the said capital stock of Old South Sea Annuities who shall not signify their assents to accept New 3*l.* 10*s.* per centum Annuities, 2*l.* 10*s.* per centum Annuities, or Exchequer Bonds, upon the terms and in the manner herein mentioned, shall, on the 5th day of April, 1854, receive the sum of 100*l.* for every 100*l.* of such capital stock which may be then standing in their respective names, and so in proportion for any greater or less amount: Provided always, that the payment at the Bank of England for the use of the persons entitled thereto of any money payable under this provision in respect of the said capital stocks shall be and be deemed a full discharge of the amount so paid, and that the proprietors of the said capital stocks respectively, or their agents duly authorized, shall be at liberty to demand and receive payment from the said bank, upon application for that purpose, at any time after the said 5th day of January and the 5th day of April, 1854, respectively of the sums so paid for the use of such proprietors respectively."

At the time of the passing of the South Sea Annuities Commutation Act, Mr. Driffield was rector of the parish of St. Mary, Stratford, Bow. He did not assent to the conversion of the South Sea Annuities standing in his name as rector, and in April, 1854, the Bank of England paid him 3524*l.* 6*s.* 7*d.*, the gross value of the annuities. He used the money as his own money. After a temporary investment in Consols, he employed the money, together with other money, in connection with building churches at Bow. In 1880 Mr. Driffield resigned the living of St. Mary, Stratford, Bow, and was succeeded by Mr. Insley. In April, 1881, Mr. Driffield received from certain church patronage trustees the money he had advanced for church building. He then paid to Mr. Insley the sum of 3524*l.* 6*s.* 7*d.*, and took a receipt "on account of the endowment of the rectory of Bow." He also paid the back interest from the time of Mr. Insley's appointment.

Mr. Insley purchased some freehold ground-rents at Lewisham with part of the money he received from Mr. Driffield. The land was conveyed by deed dated October 25, 1881, to the use of Mr. Insley, "his heirs and assigns." The deed contained a declaration in bar of dower. The deed was not enrolled in Chancery; the execution of it was attested by only one witness. The consent of the bishop was not given to the purchase, and no licence was obtained for the rector to hold the land in mortmain. Mr. Insley in 1889 sold portions of the Lewisham property. In March, 1892, he resigned the living, and was succeeded in June, 1892, by Mr. Hare.

By a deed dated February 17, 1893, Mr. Insley, "in consideration of 5*s.* as purchase-money," as beneficial owner conveyed all the unsold Lewisham land to the use of Mr. Hare, his heirs and assigns. This deed contained a declaration in bar of dower. This deed was not enrolled, and the execution of it was attested by only one witness.

On October 6, 1893, the unsold Lewisham land was put up for sale by auction in lots on behalf of Mr. Hare. The defendant to the action became the purchaser of one lot.

The purchase was carried out by a deed dated November 14, 1893, between Mr. Hare of the first part, Mr. Insley of the second part, and the defendant of the third part. After a recital of the contract for sale, it was recited that Mr. Insley had not dealt with the property for value since the execution of the deed of February 17, 1893, and that at the request of the defendant he had agreed to join in the deed in manner thereinafter appearing. By the operative part of the deed Mr. Hare as beneficial owner conveyed, and Mr. Insley as beneficial owner confirmed, the land purchased by the defendant to him in fee simple. Mr. Hare received the purchase-money. In March, 1899, he resigned the living; the purchase-money was not forthcoming.

The plaintiff, Mr. Power, succeeded to the living, and brought this action. He claimed a declaration that the conveyance to the defendant was void, and that the hereditaments conveyed were part of the possessions appertaining or belonging to the rector of St. Mary, Stratford, Bow. In the alternative,

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a declaration that the defendant took the conveyance with notice that the hereditaments were subject to a trust for the benefit of the rector of St. Mary, Stratford, Bow, for the time being, and that the defendant was a trustee of the same for the rector for the time being. Delivery up of the title-deeds, and, if necessary, a reconveyance, an account of rents, payment of what should be found due, possession, and costs.

In addition to the above undisputed facts, his Lordship found the following to be the material result of the evidence.

Mr. Driffield knew that the 3524*l.* 6*s.* 7*d.* received by him in April, 1854, was subject to the statute 31 Geo. 2, c. 2. Mr. Insley, when he was paid that sum by Mr. Driffield, was told that it was church money. He was not told of the Act of Geo. 2, nor was any explanation given him of the origin of the fund. When Mr. Insley purchased the land, he told his solicitor that he had received the money from Mr. Driffield to be invested for the parish church at Bow, but that so far as he knew there were no conditions attached to it. When Mr. Insley conveyed to Mr. Hare, he was not represented by any solicitor; but Mr. Hare was represented by Messrs. Corbin & Greener, his solicitors. In carrying out the conveyance to the defendant, Messrs. Corbin & Greener acted for both Mr. Hare and the defendant. Neither Mr. Insley nor Mr. Hare nor Mr. Corbin, the member of the firm of Messrs. Corbin & Greener who was personally engaged, was aware of the statute 31 Geo. 2, c. 2; but Mr. Insley and Mr. Hare both knew that the property was purchased out of or represented in some way "church property." They thought, as did Mr. Corbin, that whatever the trust might be there was full power to vary the investment and to sell the land for this purpose. The defendant himself knew nothing whatever about the matter.

*Dibdin, K.C.*, and *Errington*, for the plaintiff. The investment in the ground-rents, the subject of this action, was an investment authorized as to subject-matter by the Act 31 Geo. 2, c. 2. When made, it became part of the endowment of the rectory; the conveyance by the rector to a

stranger was therefore void under 13 Eliz. c. 10, s. 3: *Magdalen College Case* (1); *Ecclesiastical Commissioners* v. *Wodehouse*. (2) That the requirements of the Act in making the investment were not strictly fulfilled does not affect this; the provisions in the Act for obtaining the consent of the bishop and the mode of giving the consent and dealing with the money were merely directory. The investment was in substance an authorized investment and legal: *Lechmere* v. *Earl of Carlisle* (3); *Sowden* v. *Sowden* (4); *In re Parker's Charity*. (5)

The Act of 13 Eliz. c. 10, is applicable to equitable as well as legal interests.

If the conveyance to the defendant was not void under the statute, the land was held by Hare in fee as trustee for the rector for the time being. The purchaser was acting by a solicitor who had notice of the trust, and was therefore himself affected with notice: *Bailey* v. *Barnes*. (6) He was consequently bound to see that the purchase-money was properly protected, and he was liable for it when it was misapplied: Lewin on Trusts, 9th ed. p. 522, n.; Godefroi on Trusts, 2nd ed. p. 464; Dart on Vendors and Purchasers, 6th ed. p. 688; Sugden on Vendors and Purchasers, 14th ed. p. 663; *Robinson* v. *Robinson*. (7)

The beneficiaries, where money has been wrongfully invested in land, are entitled to follow the property and take the land. A purchaser with notice of the trust cannot get a good title without the concurrence of all the beneficiaries: *In re Hallett's Estate* (8); *Lane* v. *Dighton* (9); Lewin on Trusts, 9th ed. p. 1024; Underhill on Trusts, 4th ed. p. 557; *Attorney-General* v. *Merchants Venturers Society* (10); *In re Salmon*. (11)

*Micklem, K.C.*, and *Buckmaster*, for the defendant. The land, the subject of the action, never was vested in the rector

(1) (1615) 11 Rep. 66 b, 78 b.
(2) [1895] 1 Ch. 552.
(3) (1733) 3 P. Wms. 211, 227.
(4) (1785) 1 Bro. C. C. 582, 583, n.; 1 Cox, 165.
(5) (1863) 32 Beav. 654.
(6) [1894] 1 Ch. 25.
(7) (1876) Ir. R. 10 Eq. 189.
(8) (1880) 13 Ch. D. 696, 709.
(9) (1762) Amb. 409.
(10) (1842) 5 Beav. 338, 357.
(11) (1889) 42 Ch. D. 351.

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as rector, and was not in any way affected by the Act of Elizabeth. That Act applies only to property vested in a rector and his successors, and does not affect an equitable interest. In this case money had been improperly invested in land conveyed to a private individual, whose duty it was to sell and have the purchase-money properly secured. The vendor could without the consent of any one else make a good title to the property and give a good receipt for the purchase-money: *In re Patten and Edmonton Union.* (1) The defendant's solicitor had not knowledge, obtained in the transaction, that the land was bought out of church money, and the defendant is not affected with notice of the origin of the fund: *In re Cousins.* (2) If the land was conveyed to Insley as trustee for the rector for the time being, the conveyance was void as being for a charitable purpose. If that is so, there has been adverse possession for a period sufficient to give a good title; the possession during the last part of the period was by the defendant, and the earlier possession enures to his benefit; he has therefore a good title: *Churcher* v. *Martin* (3); *Magdalen Hospital* v. *Knotts.* (4)

*Dibdin, K.C.*, in reply. The defendant cannot repudiate the title under which Hare, through whom he derives title, held, though the conveyance to Hare might have been void in favour of other people; and therefore the defendant cannot set up the Statute of Limitations: *Board* v. *Board* (5); *Dalton* v. *Fitzgerald.* (6)

The charity had possession of the land; the conveyance was only void in favour of the original grantor; the Court will enforce the rights and equities in respect of subsequent dealings as if the first conveyance had been lawful: *Attorney-General* v. *Newcastle Corporation* (7); *In re Ambleside Charity* (8); *Attorney-General* v. *Gardner* (9); *Attorney-General* v. *Munro.* (10)

(1) (1883) 52 L. J. (Ch.) 787.
(2) (1886) 31 Ch. D. 671, 676.
(3) (1889) 42 Ch. D. 312.
(4) (1879) 4 App. Cas. 324.
(5) (1873) L. R. 9 Q. B. 48.
(6) [1897] 2 Ch. 86.
(7) (1842) 5 Beav. 307.
(8) (1870) 18 W. R. 663.
(9) (1848) 2 De G. & Sm. 102.
(10) (1848) 2 De G. & Sm. 122.

June 21. COZENS-HARDY J. (after stating the above facts). The facts raise legal questions of great difficulty, especially having regard to the peculiar position of a rector. He is a corporation sole. Apart from statute or special custom, personal property cannot be vested in a corporation sole. It will pass to the executors or administrators, and not to the successors, of the corporation sole: *Fulwood's Case* (1) and *Howley* v. *Knight* (2), and cases there cited. Apart from statute, real property cannot be vested in a corporation sole, either at law or in equity, without a licence in mortmain. Now the statute of 31 Geo. 2 clearly vested the South Sea stock in the rector as a corporation sole, and thus created an exception from the general law. The Conversion Act of 1853 enabled all persons and bodies, politic or corporate, to assent to accept new stock, and provided that those who should not signify their assent should receive 100*l.* cash for every 100*l.* of stock, and should be at liberty to demand and receive payment from the bank. The bank assumed, and I think rightly, that Mr. Driffield, as a corporation sole, could receive and give a good discharge for the cash. Whenever by statute or by special custom, as in the case of the Chamberlain of London, chattels or choses in action are vested in a corporation sole, it seems to follow that such corporation sole must have the right to receive and get in and give a good discharge for the property thus vested in him. Mr. Driffield handed the money to Mr. Insley, who must be taken to have received it in his character of corporation sole. His receipt was a good discharge to Mr. Driffield. Mr. Insley was accountable for this money to his successor, Mr. Hare. When in 1881 he invested part of the money in the purchase of land he did not purport or intend to effect a purchase under the statute of Geo. 2, of which he had never heard. Nor did he purport or intend, as an individual, to create a trust of the land for the benefit of himself and his successors, as a corporation sole. Any such trust would have been unlawful as putting an equitable estate in mortmain without a licence from the Crown. In other words, Insley could not elect to treat this land as part of the benefice or as appertaining or belonging to it. The land

(1) (1591) 4 Rep. 64 b. (2) (1849) 14 Q. B. 240.

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was, therefore, not subject to the restraining Acts, and I cannot hold the subsequent conveyance by Hare to the defendant to be void under the statute 13 Eliz. c. 10.

What, then, was the legal position when Mr. Insley purchased the land? He still remained accountable for the cash. There was nothing to prevent him from selling the land, which was his, to provide the cash. In the case of an unauthorized purchase by a trustee, I think the trustee can make a good title to a purchaser with notice, provided only that all the beneficiaries are not at once competent and desirous to take the land in specie: see *In re Patten and Edmonton Union.* (1) Here there was no beneficiary either competent or desirous to take the land in specie. The right of the trustee to sell cannot depend upon the question whether the entire amount of the trust fund or only a portion of it is cleared by the sale. He must have a right to sell in lots and generally to realize the property as a prudent owner would. He is simply doing his duty by turning the property into cash so as to replace as far as may be the trust fund. The contrary view would prevent a trustee from ever remedying a breach of trust of this nature without instituting a suit for that purpose, as was done in *Robinson* v. *Robinson.* (2) Now cestuis que trust are said to have a lien upon the improper investment, but, where there is no right to elect to take the land in specie, I am not aware of any authority which shews that, before proceedings taken to assert the lien, the trustees cannot realize the property by means of an honest sale. It is analogous to the lien which, on the dissolution of a partnership, exists on partnership assets in favour of a retiring partner, or the executors of a deceased partner. Such a lien does not prevent the continuing or surviving partner from selling the assets: *In re Langmead's Trusts.* (3) But I doubt whether this analogy is not too favourable to the plaintiff. By means of the sales effected by Insley the purchase-money got into the hands of the corporation sole, i.e., into the proper hands, and I cannot see what harm was done by this. To affect the purchasers from Insley with the

(1) 52 L. J. (Ch.) 787. (2) Ir. R. 10 Eq. 189.
(3) (1855) 20 Beav. 20; 7 D. M. & G. 353.

consequences of any subsequent misappropriation by the corporation sole would be unjust unless the sale itself was a wrongful act. On Insley's retirement in 1892 I assume that he in some way secured the purchase-money he had received for the benefit of Hare, as corporation sole. He certainly passed on to Hare, as an individual, the unsold property, which, so far as appears, was of ample value to make good the balance. Hare sold by public auction; no impropriety in the sale is suggested. The legal estate passed to the defendant. The purchase-money was received by Hare, the corporation sole. It reached the proper hands. Hare subsequently stole the money; but I cannot bring myself to make the defendant answerable for his misdeeds.

I have assumed in favour of the plaintiff, without deciding it, that the defendant cannot, having regard to Corbin's position of solicitor for vendor and purchaser, be regarded as a purchaser for value without notice. But even on that assumption I think, for the reasons above stated, that the action fails, and I must dismiss it with costs.

Solicitor for plaintiff: *Leslie Stock.*
Solicitors for defendant: *Corbin, Greener & Cook.*

D. P.

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*July* 11, 19.

## HARTLEY *v.* PENDARVES.

(Old Suit.)

*Administration—Lunacy—Settled Land—Timber—Conversion.*

Both the tenant for life, impeachable for waste, and the tenant in fee in remainder of land subject to an administration suit were lunatic. Under an order made in Chancery and in Lunacy timber was cut and sold:—

*Held*, that the proceeds of the timber were, subject to the life interest, personal estate of the tenant in fee.

This was a suit instituted in 1834 for the administration of the estate of Henry Harris, who died in 1830. He made a will by which he settled (inter alia) estates in Cornwall, called Rosteague and Tregassa, on trust for his niece Mary Hartley (the wife of William Henry Hartley) and her issue.

Mary Hartley had issue, only one son, William Henry Harris Hartley.

In 1860 Mary Hartley and William Henry Harris Hartley were lunatic, and continued to be lunatic till they died. Mary Hartley was equitable tenant for life subject to impeachment for waste, and William Henry Harris Hartley was tenant in fee in remainder of the Rosteague and Tregassa estates. There was a question subsequently litigated, whether William Henry Harris Hartley was tenant in tail only, or tenant in fee. It was ultimately decided in the House of Lords that he was tenant in fee.

By an order made on July 28, 1860, by the Lords Justices in Lunacy and in Chancery it was (inter alia) referred to the Masters in Lunacy to inquire and certify "whether there are any and what timber and other trees standing or growing upon the lands called Rosteague and Tregassa proper to be cut, and whether it is fit and proper and for the benefit of the said Mary Hartley and William Henry Harris Hartley that the same (if any) should be felled and sold, and that the said William Hunter Little do as such committee as aforesaid cause to be felled such timber or other trees as the said masters shall approve of as proper to be cut, and do sell the same with the masters' approbation, and pay the net proceeds

of such sale to be certified by the master into the bank with the privity of the Accountant-General to the credit of the said cause of *Hartley* v. *Pendarves*, 'the timber account,' and that the same when so paid in be laid out in the purchase of bank 3*l.* per cent. annuities in the name and with the privity of the said Accountant-General in trust in the same cause, the like account, and that the dividends from time to time to accrue on the bank annuities which shall be so purchased be carried over to the credit of the said matter of Mary Hartley, a lunatic."

A master made his certificate dated April 15, 1864, and thereby certified (inter alia) "that the said William Hunter Little, as committee of the estates of the said Mary Hartley and William Henry Harris Hartley, and with his approval, caused to be felled such timber and other trees, and with his approval sold the same by public auction and in lots, and the sum of 95*l.* 5*s.* 2*d.* is the net proceeds of such sale, and is the sum which the said William Hunter Little is to pay into the bank with the privity of the Accountant-General of the Court of Chancery to the credit of the said cause of *Hartley* v. *Pendarves*, 'the timber account.'"

Mary Hartley died in October, 1888, and William Henry Harris Hartley died in June, 1894.

There was now in court to the credit of "the timber account" 103*l.* 19*s.* 3*d.* Consols, representing the capital realized by the sale of the timber, and 93*l.* 3*s.*, cash income accrued since the death of Mary Hartley; of this 17*l.* 18*s.* 11*d.* had accrued since the death of William Henry Harris Hartley. This was a summons taken out by Lucien Stanislaus Leon Van Grutten, the heir-at-law of William Henry Harris Hartley, for transfer to himself of the Consols in court and payment of the cash as to the 18*l.* 12*s.* 6*d.* accrued since the death of William Henry Harris Hartley to himself, and as to the balance to the administrators, the respondents to the summons.

*Boome*, for the heir. Where there is a lunatic tenant for life, any dealing by the Court with the capital property of

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which the lunatic is tenant for life will not be allowed to affect the subsequent rights of the parties. The proceeds of the timber went to the remainderman as real property, and on his death intestate descended to his heir: *Field* v. *Brown* (1); *Attorney-General* v. *Marquis of Ailesbury* (2); *Awdley* v. *Awdley*. (3)

*S. Dickinson*, for the administrators. The case of *Field* v. *Brown* (1) is one that cannot be relied on. In dealing with property in which a lunatic is interested, it is true that the Court will not unnecessarily do anything that may have the effect of altering the devolution of property; the main thing, however, that the Court looks to is the benefit of the lunatic; personal property, if it is desirable, will be applied in expenditure on land, and land will be converted and the proceeds become personalty: Lewin on Trusts, 10th ed. p. 1177; *Ex parte Bromfield* (4); *Oxenden* v. *Lord Compton* (5); *Steed* v. *Preece* (6); *Ex parte Phillips*. (7)

*Boome*, in reply.

July 19. COZENS-HARDY J. (after stating the facts). The order directing the sale of the timber was made under the general jurisdiction of the Court, and was not in any way dependent upon the circumstance that both tenant for life and the tenant in fee were lunatics. The jurisdiction of the Court to order the sale of timber on a settled estate when it is for the benefit of all parties interested in the settled estate is well established, and in such a case the tenant for life, though impeachable for waste, is entitled to the income produced by the proceeds of sale of the timber: see *Tooker* v. *Annesley*. (8) It was on this footing that the committee of Mary Hartley received the dividends of the Consols during her life. This being so, I think that where timber has been rightfully sold under an order of the Court all the consequences of conversion

(1) (1859) 27 Beav. 90.
(2) (1887) 12 App. Cas. 672, 680.
(3) (1690) 2 Vern. 192.
(4) (1792) 1 Ves. Jr. 453; 2 R. R. 126.
(5) (1793) 2 Ves. Jr. 69; 2 R. R. 131.
(6) (1874) L. R. 18 Eq. 192.
(7) (1812) 19 Ves. 118; 12 R. R. 151.
(8) (1832) 5 Sim. 235.

must follow, and that there is no equity as between the heir and the legal personal representative of the owner in fee. This is the view taken by Sir George Jessel in *Steed* v. *Preece* (1) and by Kay J. in *Hyett* v. *Mekin*. (2) It is contended, however, that the point was decided in the opposite sense by Sir John Romilly in *Field* v. *Brown*. (3) I cannot regard that as a satisfactory authority. It seems to me difficult to reconcile it with the decision of the same learned judge in *Dyer* v. *Dyer*. (4) It was apparently based on *Cooke* v. *Dealey* (5), a case which was disapproved by Sir George Jessel in *Steed* v. *Preece*. (1)

Under these circumstances I feel at liberty to follow my own view, and to hold that the Consols in court form part of the personal estate of the late owner in fee. The order must, subject to the payment of costs, direct the transfer of the Consols to the legal personal representative of William Henry Harris Hartley.

Solicitors for heir: *Collyer-Bristow & Co.*
Solicitor for administrators: *Lingard.*

(1) L. R. 18 Eq. 192.
(2) (1884) 25 Ch. D. 735.
(3) 27 Beav. 90.
(4) (1865) 34 Beav. 504.
(5) (1855) 22 Beav. 196.

D. P.

*Distinguished.* WRIGHT *v.* MACADAM. [1949] 2 All E.R. 565.

FARWELL J.

1901

*May* 10–16.

## BURROWS *v.* LANG.

[1900 B. 2877.]

*Watercourse—Artificial Channel—Temporary Purpose—Severance of Tenements—Precarious Easement—Implied Grant—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 6.

A watercourse constructed for the purpose of a mill is constructed for a temporary purpose within *Arkwright* v. *Gell*, (1839) 5 M. & W. 203, and similar authorities.

A precarious easement is unknown to the law.

The owner of an ancient mill and a farm the cattle whereof were to some extent watered at an ancient watercourse diverted from a natural stream, and running on the mill property alongside the farm, but constructed and maintained solely for the purpose of the mill, conveyed the farm to a purchaser without mentioning any water right:—

*Held*, that, having regard to the special temporary purpose for which the watercourse was constructed, the expense of maintaining it, and the fact that it lay entirely on the mill property, the purchaser had acquired no right, either by implied grant or under the general words of the Conveyancing Act, 1881, s. 6, to have it continued for his benefit, and the watercourse being therefore precarious, he could have no right to the use of the water (if any) therein.

*Birmingham, Dudley and District Banking Co.* v. *Ross*, (1888) 38 Ch. D. 295, followed and applied.

*Watts* v. *Kelson*, (1871) L. R. 6 Ch. 166, distinguished.

WITNESS ACTION.

The defendant was the owner of property in Shirenewton, Monmouth, on which an artificial watercourse and pond had been constructed more than a century ago for the purposes of the Lower Cwm Mill situate thereon, the water being diverted from and ultimately returned to a natural stream forming the western boundary of the property. The supply was regulated by a hatch at the intake sluice. The watercourse was originally open, but in 1884 it was partly inclosed in earthenware pipes. The plaintiff was the owner of the Cwm Farm lying to the east of the defendant's property, and abutting for a short distance on the pond, which, as well as the watercourse, lay wholly on the defendant's property.

There was no evidence as to the ownership of the properties

at the time the watercourse and pond were constructed, but from 1831 to 1886 both properties belonged to common owners. During that period the farm cattle, though chiefly watered at a watering-place on the mill property, used also to drink direct from the pond at the common boundary.

In 1886 the common owners, who were trustees, conveyed the farm property to the plaintiff without referring to any water rights; and in 1893 they conveyed the mill property to the defendant without any exception or reservation.

The plaintiff had continued to water his cattle in the pond at the common boundary, and claimed the right to use the water for watering his cattle or for other farm purposes; but the defendant had recently cut off the water at the intake sluice, and fenced off the pond along the common boundary.

The plaintiff brought this action for an injunction to restrain the defendant from obstructing the flow of water into the watercourse and pond, or otherwise interfering with the plaintiff's right of watering cattle in the pond and using the water for farm purposes.

The defendant denied the plaintiff's rights.

The evidence shewed that the maintenance and management of the watercourse and pond were a source of expense to the defendant, and that if the plaintiff's cattle were watered in the pond, they would be likely to trample on and damage the puddled bottom, thereby causing escape of water, for which the defendant would be liable to the lower riparian proprietors, to whom it was of great value.

*Butcher, K.C.*, and *Stewart-Smith*, for the plaintiff. There was a continuous and apparent right of watering in 1886 which passed to the plaintiff under s. 6 of the Conveyancing Act, 1881 (1), or by implied grant: *Watts* v. *Kelson*. (2)

The defendant must, therefore, maintain the flow of water,

(1) The Conveyancing Act, 1881, provides as follows:—

Sect. 6: "(1.) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all . . . . waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever . . . . at the time of conveyance . . . . enjoyed with . . . . the land or any part thereof."

(2) L. R. 6 Ch. 166.

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or, at all events, must not obstruct the plaintiff's right to use the water actually in the pond.

*Upjohn, K.C.*, and *F. H. Colt*, for the defendant. The Conveyancing Act, 1881, s. 6, merely inserts general words in a conveyance, and does not create new rights. It can only pass a right that has been enjoyed under circumstances leading to an expectation of the continuance of that enjoyment: *Birmingham, Dudley and District Banking Co.* v. *Ross*. (1)

In *Watts* v. *Kelson* (2) the watercourse was made for the permanent benefit of both tenements.

In the present case the watercourse was constructed simply for the purpose of the mill. As there could be no expectation that it would be continued if the mill were abandoned, the purpose was merely temporary, and the plaintiff acquired no easement.

The plaintiff's grantors cannot have intended to subject the land they retained to the expensive burden of maintaining the watercourse when no longer required for the mill. It would have been a breach of trust on their part. The claim to have the flow continued cannot, therefore, be sustained: *Arkwright* v. *Gell* (3); *Wood* v. *Waud* (4); *Mason* v. *Shrewsbury and Hereford Ry. Co.* (5); *Rameshur Pershad Narain Singh* v. *Koonj Behari Pattuk* (6); *Kensit* v. *Great Eastern Ry. Co.* (7); *M'Evoy* v. *Great Northern Ry. Co.* (8)

The right claimed to use water, the supply of which can be entirely discontinued at the defendant's will, is a precarious right unknown to the law and repugnant to the nature of an easement: *Hanna* v. *Pollock*. (9)

*Butcher, K.C.*, in reply. This watercourse was constructed for the purpose of working an apparently permanent mill. That is a permanent purpose within the authorities, although the mill, like any other undertaking, is liable to abandonment; but so long as the mill is continued as a water-mill, the defendant can only cut off the water for the purpose of repairs. The

(1) 38 Ch. D. 295, 307.
(2) L. R. 6 Ch. 166.
(3) 5 M. & W. 203, 232.
(4) (1849) 3 Ex. 748, 779.
(5) (1871) L. R. 6 Q. B. 578, 584.
(6) (1878) 4 App. Cas. 121, 126.
(7) (1884) 27 Ch. D. 122, 134.
(8) [1900] 2 I. R. 325, 333.
(9) [1898] 2 I. R. 532, 549; [1900] 2 I. R. 664, 671.

fact that the defendant controls the flow does not negative the plaintiff's right: *Rameshur Pershad Narain Singh* v. *Koonj Behari Pattuk*. (1)

In *Arkwright* v. *Gell* (2) the defendant had acquired a right to discharge water on the plaintiff's land, and the plaintiff sought to establish a counter-easement to have the discharge continued. That difficulty does not arise here, as the water is wholly on the defendant's land.

The words of the Conveyancing Act, 1881, s. 6, are not confined to easements, and would pass the intermittent privilege of taking water from the pond if and so long as it is there, even though the enjoyment of such a privilege, being precarious, could not have created a right by prescription.

FARWELL J. The questions that have been argued are, first, whether the plaintiff has the right to compel the defendant to continue the flow of water into the mill-pond so as to enable the plaintiff to water his cattle and draw water therefrom; secondly, whether, if the plaintiff has not got that larger right, he has got at any rate the right to take water for the purposes of his cattle and otherwise if and so far as there should be any water in the mill-pond.

The questions depend on the construction of the general words in s. 6 of the Conveyancing Act, 1881. I have no evidence to shew the circumstances under which the particular watercourse was made, nor do I think it is material, because for at any rate fifty years prior to 1886 both properties were in the same hands and belonged to the same persons, and therefore no rights could arise. What I have to consider is whether there was anything which could pass under the general words in the Conveyancing Act, 1881, s. 6, as enjoyed with the farm at the time of the conveyance.

Now, on this point I have the assistance of Cotton L.J.'s exposition of the section in *Birmingham, Dudley and District Banking Co.* v. *Ross*. (3) It is not sufficient for the plaintiff to point to the state of nature and say that because there is a

(1) 4 App. Cas. 121, 126. (2) 5 M. & W. 203, 232.
(3) 38 Ch. D. 295, 307.

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stream flowing by his land he must therefore have the right to draw water from it. It must first be ascertained whether the stream is a natural or an artificial watercourse. If the stream is a natural stream, the plaintiff as a riparian proprietor has the right to the flow of the water with the incidental right of taking water subject to the rights of the lower riparian proprietors. If, as in this case, it is an artificial stream, other considerations arise. *Birmingham, Dudley and District Banking Co.* v. *Ross* (1) is an authority applicable to the present case, and it shews that I have to consider the circumstances existing at the time of the grant. At the time of the grant in that case the grantee's windows were lit by light coming over the grantor's land, but it was decided that, "The maxim that a grantor shall not derogate does not entitle a grantee of a house to claim an easement of light to an extent inconsistent with the intention to be implied from the circumstances existing at the time of the grant and known to the grantee"; and Cotton L.J. says: "I think it could not be said that the light coming over that low building to these windows could be considered as enjoyed with it within the meaning of this section. The light did in fact at the time come over that building; but it came over it under such circumstances as to shew that there could be no expectation of its continuance. It had not been enjoyed in fact for any long period; and in my opinion it was enjoyed under such circumstances, known to both parties, as could not make it light enjoyed within the meaning of that section. That expression must mean not light which a person has a right to under the statute, but that which he has enjoyed under circumstances which would lead to an expectation that the enjoyment of that light would be continued, and that it would not be simply precarious."

I have, therefore, to consider the circumstances under which and the purposes for which this watercourse was created, and that is equivalent to saying that I must consider it in the same way as if it had been a question of a prescriptive right or of presuming a lost grant.

(1) 38 Ch. D. 295, 307.

Now, with regard to that question the law is to some extent settled. In *Rameshur Pershad Narain Singh* v. *Koonj Behari Pattuk* (1), where the common law cases are conveniently referred to, Sir Montague Smith, a very eminent common lawyer, says, "There is no doubt that the right to the water of a river flowing in a natural channel through a man's land, and the right to water flowing to it through an artificial watercourse constructed on his neighbour's land, do not rest on the same principle."

I venture to add to that—the right to water flowing through an artificial watercourse constructed on a man's own land passing by his neighbour's land does not rest on the same principle as that of water flowing in a natural channel by his neighbour's land.

In *Greatrex* v. *Hayward* (2) Parke B. says: "The right of the party to an artificial water-course, as against the party creating it, must depend upon the character of the water-course, and the circumstances under which it was created."

Applying that principle to the present case by the light of *Birmingham, Dudley and District Banking Co.* v. *Ross* (3), it appears to me that what I have to consider is whether, having regard to the fact that this is an artificial watercourse through the defendant's land requiring repairs from time to time made solely for the use of the mill and used entirely for mill purposes—except so far as it may have been used at the old watering-place, which does not belong to the plaintiff—I can infer that there was an intention to grant the right to compel the miller to continue to send down the water whether he wanted it or not, and although he might have given up the mill altogether, and might not think it worth his while to keep the pond water-tight. Regarded as a question of prescription, I should have to consider whether the artificial watercourse was made for a temporary purpose or not. The plaintiff contends that this was not a temporary purpose. That depends on the meaning of the word temporary. In *Arkwright* v. *Gell* (4) the fact that water pumped from mines had flowed

(1) 4 App. Cas. 121, 126.
(2) (1853) 8 Ex. 291, 293.
(3) 38 Ch. D. 295, 307.
(4) 5 M. & W. 203, 232.

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over a man's land for upwards of sixty years gave him no right to a continuance of the flow. The meaning of "temporary purpose" is, therefore, not confined to a purpose that happens to last in fact for a few years only, but includes a purpose which is temporary in the sense that it may within the reasonable contemplation of the parties come to an end. For example, if a man pumps water from his mines for the purpose of draining them, that is a temporary purpose, as it is limited by the duration of the workings. If a man makes a water-course leading water to a mill-pond for the use of his own mill on his own land, that is a temporary purpose, as it is limited to the period for which he uses the mill. In both cases, in my judgment, it is a temporary purpose within the meaning of the authorities. It is not meant to be a permanent alteration of the face of nature, but a temporary alteration for the purpose of and co-extensive with the carrying on of a particular business—in this case the business of a miller, and that is a temporary purpose within the authorities.

The plaintiff contends that this case is to be distinguished from the case of water pumped over another man's land because this water does not go over the plaintiff's land at all, but abuts on it. To my mind that is a distinction which is against him. One can well understand that the Court might the more readily presume an agreement between the parties if the one of them pumped water out of his own land for his own convenience, and the other accepted it, and allowed it to run over his land for his own convenience. In that case one could more readily come to the conclusion on proper evidence that there was an arrangement that the flow of the water should be for the mutual benefit of both. No such presumption arises when water is conducted by a man entirely over his own land, and not over the land of his neighbour. In that case nothing moves from the neighbour by way of consideration for the supposed easement.

This is pointed out by Palles C.B. in *M'Evoy* v. *Great Northern Ry. Co.* (1): "It is settled law that the rights to the water flowing in an artificial water-course constructed by a

(1) [1900] 2 I. R. 325, 333.

particular person upon his own land and for his own benefit are not regulated by the law applicable to natural water-courses, but are to be ascertained by a view of the purpose for which the original structure was built: *Arkwright* v. *Gell* (1); *Wood* v. *Waud*. (2) In *Powell* v. *Butler* (3) the drain was constructed through the lands of *several* tenants; the consent of each was necessary to its construction; its construction was an equal benefit to each; the circumstances were such that each had a *right* to use it, so long as it continued to exist; and, after twenty years' enjoyment, it was held that each of them had acquired a prescriptive right to the flow. I regard that decision as absolutely right, having regard to its special circumstances; but I equally hold that, as a general rule, circumstances which are sufficient to create an easement in favour of a particular person, do not necessarily subject the land of that person to the servitude of continuing to maintain in existence, for the benefit of the servient tenement, the works constructed by him for the purposes only of that easement. In other words, the existence of an easement does not carry with it any presumption of the creation or existence of a counter-easement in the owner of the servient tenement against the owner of the dominant tenement. Certain circumstances may give rise to such counter-easement. The circumstance that part of the works executed on the lands of another are such as to require the consent of the owner of the servient tenement may in certain circumstances tend to do so, especially in cases in which the easement has been acquired by prescription, and in which the circumstances of the original structure, or its subsequent use, indicate an intention that it was constructed for the benefit of both tenements. But no case of this exceptional class has any application to the present; for here all the works were on the defendants' own land; the consent of those from whom the plaintiff claims was not necessary for their legality; and the only inference capable of being drawn is, as I have already said, that they were constructed for the sole benefit of the railway company."

(1) 5 M. & W. 203. (2) 3 Ex. 748.
(3) (1871) Ir. R. 5 C. L. 309.

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In the present case it appears to me that the fact that the water abuts on the plaintiff's land raises no presumption that it was intended to be for his benefit as well as for the benefit of the mill for which the watercourse was constructed.

I hold, therefore, that no right has been shewn to compel the continuance of this flow of water, and I pause here to point out the very serious consequences that would result from my holding the contrary. In the first place, it would impose upon the miller the burden of keeping the hatch at the intake sluice in repair and of employing a man to open and shut it, because he certainly would not be safe in keeping it always open without reference to the fact whether he wanted water for his mill or not, running the risk of its being lost in transit to the detriment of the lower riparian proprietors. It would also entail on him the liability of keeping the whole watercourse and mill-pond in repair, to prevent escape of water, because, having diverted the water from the brook, he is bound to return it to the lower riparian proprietors without undue diminution. If the plaintiff has the right he claims, I do not see how he can prevent his cattle from trampling on the puddled bottom of the pond and causing leakage; and the servitude that I should be imposing on the defendant would be of a very onerous nature. It seems to me inconceivable that the vendors when making this grant, which contains no reference whatever to the water, could have intended to undertake any such burthen; and perhaps from this point of view there may be something in the fact that they were trustees, as it renders it still more improbable that they intended to undertake such a liability.

Then the second point arises: it is said that even if the plaintiff has no right to have the flow continued, he nevertheless has the right to take water if and when it is in the pond. To my mind that is a claim which is inconsistent with the very idea of the nature of an easement. As stated by Lord Coke, Co. Litt. 113 b, quoting Bracton, 222 b, the possession or seisina necessary for an easement must be nec per vim nec clam nec precario. What is precarious? That which depends, not on right, but on the will of another person. As Bracton,

221 a, puts it: "Si autem precaria fuerit et de gratia, quae tempestive revocari possit et intempestive, ex longo tempore non acquiritur jus." That is to say, if the servient owner can tempestive aut intempestive—whether the dominant owner likes it or not—put a stop to the easement, there is really no easement, because the very idea of right which necessarily underlies an easement is negatived.

Can the plaintiff have any right to use water in the pond when he has no right to compel the defendant to supply any? So far as I know, this particular point has not been reported in any case except so far as it is determined or touched on in *Hanna* v. *Pollock* (1), where FitzGibbon L.J. says (2): "The whole doctrine of presumed grant rests upon the desire of the law to create a legal foundation for the long-continued enjoyment, *as of right*, of advantages which are primâ facie inexplicable in the absence of legal title. In cases such as this, where the grant is admittedly a fiction, it is all the more incumbent on the judge to see, before the question is left to the jury, that the circumstances and character of the user import that it has been '*as of right*.' It appears to me, in the present case, that the evidence is inconsistent with right, and that the user is consistent only with permission to enjoy what the supposed grantor did not want, if and so long as that user might be consistent with the rights of third parties, and also with the grantor's right to use his own property from time to time in a reasonable manner. Such a user never could have been as of right in its inception; it could never acquire during its continuance any higher than a permissive character, and it therefore never could be, or become, a foundation for the presumption of a grant"; and Walker L.J. uses words to the same effect. (3)

That is a very clear exposition of the law, and accords with my own view that it is impossible to create a new burden that is something short of an easement—that is to say, an easement which shall be enjoyed nec per vim nec clam sed precario. To my mind there is no such right known to the law. The

(1) [1898] 2 I. R. 532, 549; [1900] 2 I. R. 664, 671.

(2) [1900] 2 I. R. 671.

(3) Ibid. 690.

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plaintiff points out that s. 6 of the Conveyancing Act, 1881, is not confined to easements, but also passes all liberties, privileges, rights, and advantages whatsoever enjoyed with the land. The words are satisfied by giving him that which was enjoyed with the land, namely, the permissive user so long as the miller did not choose to stop it. That advantage he gets; but to say that those words create any new right hitherto unknown to the law is what I have never before heard suggested, and I certainly am not going to be the first to hold it. A right unknown to the law cannot pass by implied grant or under the general words of the section.

*Watts* v. *Kelson* (1), on which the plaintiff relied, is not really in point, because the whole of the basis on which I rest my judgment was absent in that case. There was no question of an artificial watercourse having been made for one property only. The artificial watercourse in that case was made for the express purpose of providing both the properties with water. The question raised in the present case was not argued; the point did not arise; the only point was whether a quasi-easement, which would by its nature have been an easement if there had not been common ownership, passed by the grant, and it was held that it did.

In the present case that is entirely excluded, because I hold that there was no quasi-easement which could pass by the grant, by reason of its precarious nature.

The result is that the plaintiff's case wholly fails, and I can do nothing but dismiss it with costs.

Solicitors: *Thomas White & Sons, for J. C. Llewellin, Newport, Mon.; Warriner & Co., for Davis, Lloyds & Wilson, Newport, Mon.*

(1) L. R. 6 Ch. 166.

G. R. A.

# LA SOCIÉTÉ ANONYME DES ANCIENS ÉTABLISSEMENTS PANHARD ET LEVASSOR *v.* PANHARD LEVASSOR MOTOR COMPANY, LIMITED.

FARWELL J.
1901
*July* 15.

[1900 L. 1162.]

*Company—Name of Company—Registration—Fraudulent Purpose—Trade Name—Foreign Firm—Imitation—Signatories to Memorandum—Liability—Form of Injunction.*

A foreign trader who has no English agency, but whose goods are in fact frequently imported into England, has a sufficient English market to enable him to restrain piracy of his trade name.

*Collins Co.* v. *Brown*, (1857) 3 K. & J. 423, followed.

Where a company is formed for a fraudulent purpose, the signatories to the memorandum are guilty of a fraudulent conspiracy to effect that purpose.

Where a motor-car manufacturing company was registered in a name colourably resembling that of existing motor-car manufacturers with the fraudulent intention of obtaining the benefit of their reputation in that business, the company and the signatories to the memorandum, who were the only directors and shareholders, were restrained from using the name in connection with that business, and the signatories were further restrained from allowing the company to remain registered under that name.

WITNESS ACTION.

The plaintiffs were a French company founded in 1897 and carrying on business in Paris as motor-car manufacturers in succession to the former firm of Panhard et Levassor. They had no agency in England at the time the action was brought, as many of their motors had embodied inventions covered by English patents held by the British Motor Company, Limited, who had granted a licence to the Motor Manufacturing Company, Limited, with power to grant sub-licences. The plaintiffs held no licence, but their motors had been frequently imported into England, either by the British Motor Company, Limited, or by private purchasers, who as a rule obtained the requisite licence, and the evidence shewed that the words "Panhard" or "Panhard Levassor," when used in the English market, denoted motors of the plaintiffs' manufacture.

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LA SOCIÉTÉ ANONYME DES ANCIENS ÉTABLISSEMENTS PANHARD ET LEVASSOR v. PANHARD LEVASSOR MOTOR COMPANY, LIMITED.

The defendants were the Panhard Levassor Motor Company, Limited, registered March 29, 1900, with a capital of 100*l.* divided into 100 shares of 1*l.* each, and the seven signatories to the memorandum of association, who each held one share. The principal objects of the defendant company were the manufacture and sale of motor-cars. The signatories, none of whom bore the name of Panhard or Levassor, were the only shareholders and directors, and the defendant company had not commenced to carry on business.

The plaintiffs alleged that the signatories had wrongfully and fraudulently, and with intent to injure the plaintiffs in their said business, conspired together to form, and had formed, and procured the defendant company to be registered, that the English public would be led to believe that the defendant company were selling the plaintiffs' goods, and that the plaintiffs would be prevented from registering themselves or their agents as a company in England under their own name or a name similar thereto.

The plaintiffs claimed (1.) an injunction to restrain the defendant company and the signatories from using the names of Panhard and Levassor or either of them, or any title or description including those names or either of them, or otherwise colourably resembling the name of the plaintiffs, in connection with the manufacture or sale of motor-cars; (2.) an injunction to restrain the signatories from allowing the defendant company to remain registered under its present name or any such title or description as aforesaid; (3.) damages.

The defendants explained that their company had in fact been formed by the Motor Manufacturing Company, Limited, their proposed licensors, the particular name being chosen in order to prevent any risk of the plaintiffs registering a company in their own name, which, on obtaining a licence from the patentees, might seriously interfere with the English trade of the Motor Manufacturing Company, Limited. They entirely disclaimed any intention of obtaining the benefit of the plaintiffs' reputation or passing off their goods as those of the plaintiffs, and offered to adopt effectual means of distinguishing them in their advertisements and otherwise.

*Moulton, K.C., A. J. Walter, J. F. Iselin,* and *H. F. Moulton,* for the plaintiffs. The plaintiffs, though not carrying on business in England, are entitled to restrain the piracy of their trade name and reputation: *Collins Co.* v. *Brown.* (1)

*Upjohn, K.C.,* and *Stewart-Smith,* for the defendants. In *Collins Co.* v. *Brown* (1) there was an interference with the plaintiffs' market, a fact which must be established before an injunction can be granted: *Jamieson & Co.* v. *Jamieson.* (2) In the present case the plaintiffs have no market in England.

The defendants have merely registered their company with the bonâ fide object of preventing the plaintiffs registering a company here in their own name. They have no intention of passing off their goods as those of the plaintiffs, and are quite willing to advertise the fact that they have no connection with the plaintiffs. Apart from fraud, no injunction can be granted: *Burgess* v. *Burgess.* (3)

[FARWELL J. The defendants either mean to steal the plaintiffs' business or to prevent them having any in England. They are wrong on either alternative.]

Again, no relief ought to be granted against the signatories, who have merely signed the memorandum.

[FARWELL J. Could the highwaymen in *Everet* v. *Williams,* cited in Lindley on Partnership, 6th ed. p. 101 (4), have escaped liability by forming themselves into a limited company?]

At all events, the second injunction ought not to be granted. The signatories have no power to remove their company's name from the register.

[FARWELL J. They can wind up the company, or change its name with the approval of the Board of Trade under s. 13 of the Companies Act, 1862 (25 & 26 Vict. c. 89).]

No order to that effect can be made in this action.

FARWELL J. This appears to me to be a plain case. The plaintiffs are a well-known firm of motor-car manufacturers in Paris. Their reputation has extended to England for several

(1) 3 K. & J. 423.

(2) (1897) 15 Rep. Pat. Cas. 169, 193.

(3) (1853) 3 D. M. & G. 896.

(4) [See the orders in this case verified from the originals in the Record Office, L. Q. R. ix. 197. —F. P.]

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LA SOCIÉTÉ ANONYME DES ANCIENS ÉTABLISSEMENTS PANHARD ET LEVASSOR v. PANHARD LEVASSOR MOTOR COMPANY, LIMITED.

years. Although prior to this action they had no agency and did not sell directly in England, they sold indirectly in the sense that their cars were bought and imported into England, both by the British Motor Company, Limited, and by private individuals, so that England was one of their markets. The difficulty about England was that there were certain English patents, and the great majority of the cars formerly made by the plaintiffs could not be imported into England without the licence of the patentees. In many cases those licences were obtained, and the plaintiffs got the benefit of the English market, although they only got it indirectly in the way I have mentioned.

The defendants have registered a company in England under the name of the Panhard Levassor Motor Company, Limited. The seven signatories are joined as defendants. There is absolutely no sort of excuse or justification for taking the name "Panhard Levassor." It is said that their object is not so much to annex the benefit of the plaintiffs' reputation, as it is to shut out the plaintiffs from England, and prevent them interfering with some other company which is not a party to this action. With that I have nothing to do. I judge the case as I have it before me, and I find seven persons signing the memorandum of a company with a capital of 100*l.* divided into 100 shares of 1*l.* each, with seven signatories with one share apiece, and therefore an actual paid or possibly unpaid capital of 7*l.*, for I do not know whether it has been paid or not. The question of the plaintiffs' right to an injunction is covered by *Collins Co.* v. *Brown* (1); but, apart from that authority, I should have thought it was plain that in a case such as I have stated this Court would certainly interfere to protect a foreign trader who has a market in England, in the way I have specified, from having the benefit of his name annexed by a trader in England who assumes that name without any sort of justification.

The only part of the case which has caused me a little difficulty is the claim against the seven signatories to the memorandum, who are the directors and sole shareholders of

(1) 3 K. & J. 423.

the company. The allegation is that they have fraudulently and wrongfully, and with intent to injure the plaintiffs in their said business, conspired together to form, and have formed, and procured the defendant company to be registered. Now, as I hold that the defendant company has the fraudulent intention of annexing the benefit of the plaintiffs' name, it follows that the persons who have formed that company and caused it to be registered are guilty in the eye of this Court of a fraudulent conspiracy to carry into effect that which the company, an entity without body or soul, has attempted to do, and are liable in damages accordingly. It would certainly be exceedingly unfortunate if the Court were to hold that a limited company with a very small nominal capital can be formed for the purpose of trying to do unlawful, fraudulent and illegal acts, and that no one except the incorporated body is liable.

In my opinion, the injunction which I grant against the company involves a similar injunction against the signatories who have caused the company to be registered, and who remain the only directors and members of the company. No damages have been proved, and I do not think any have been suffered, because the defendant company has not carried on business; but as the signatories are the directors, and the sole shareholders in the company, I see no reason why I should not also grant the second injunction asked against them by the statement of claim. There will, therefore, be judgment for the plaintiffs for the two injunctions as asked, and the costs of the action, and the defendants must either get the approval of the Board of Trade to a change of the company's name, or they must wind up the company.

Solicitors: *John B. & F. Purchase; Vallance, Birkbeck & Barnard.*

G. R. A.

C. A.
1901
*June* 25, 26;
*July* 15.

## CAMPBELL DAVYS *v.* LLOYD.

[1899 C. 2556.]

*Bridge—Liability to Repair—Right to Repair—Highway—Right to abate Nuisance—Trespass—Statute of Bridges* (22 *Hen.* 8, *c.* 5).

There is a broad difference between removing an obstruction which has been wrongfully placed in the highway, and making good by a permanent structure the result of mere non-feasance on the part of those charged with the duty of repairing; therefore a person who is merely entitled as one of the public to use a bridge carrying the highway over a river is not justified in entering on another person's land, and re-erecting the bridge which has been allowed to fall into a state of decay. An operation of this nature cannot properly fall under the term "abatement," even if the right to "abate" can be said to exist at all, in the case of a nuisance arising from mere non-feasance.

Where there is no obligation to repair, there can be (in the absence of special power given) no right to repair, and the default of a local authority cannot extend the burden placed upon the land, or give to other persons a right which would not have existed if the local authority had not been in default.

Appeal from a judgment of Bucknill J. in an action tried by him with a jury for Stirling J.

The plaintiff and the defendant, Penry Lloyd, were adjoining landowners at Llanwrtyd, in the county of Brecon, their properties at one point being separated by the river Irfon, across which a foot-bridge had formerly existed. In the year 1898 the defendant Lloyd re-erected the footbridge, and the plaintiff had caused that part of the bridge which passed on to, or rested on, his land to be removed.

In July, 1899, the defendant Lloyd and the other defendants to this action, who claimed that a public right of way existed across the river Irfon by means of this bridge and the ford below over the plaintiff's land, re-erected the footbridge, and in so doing cut into the plaintiff's land, and constructed thereon a platform or landing for the bridge, and inserted in the soil a pile or prop for the support of the same.

On July 21, 1899, the plaintiff commenced the present

action in the Chancery Division, claiming (1.) damages, and (2.) an injunction to restrain the defendants from passing over the plaintiff's land and his moiety of the bed of the river Irfon, and from erecting or allowing to remain any piles, platform, or other erection upon the plaintiff's land or his moiety of the bed of the river, and from cutting into or otherwise injuring the plaintiff's land or moiety of the river bed. The defendants alleged that the land on which the footbridge stood was not the plaintiff's, or was his only subject to the public rights over it as roadside waste, or part of an alleged highway leading from Llanwrtyd to Abergwesy. The jury at the trial found that the land at the point in question belonged to the plaintiff, but that there was a highway over it for foot-passengers by means of this bridge. Judgment was thereupon entered for the defendants. The plaintiff appealed, when the only question argued was that, as a matter of law, the defendants had no right to repair or re-erect the bridge, even assuming that a highway for foot-passengers by means of this bridge existed.

*Swinfen Eady*, *K.C.*, and *J. Sankey*, for the plaintiff. The defendants were not entitled to take the law into their own hands and re-erect this bridge; it does not follow because the bridge has been used by the public that therefore it is repairable by the county: *Reg.* v. *Inhabitants of County of Southampton.* (1) This is not the kind of bridge that in any case the county would be liable to repair: *Reg.* v. *Inhabitants of County of Southampton, Tinker's Bridge.* (2) The Statute of Bridges (22 Hen. 8, c. 5) does not refer to every kind of bridge; every bridge is, therefore, not necessarily repairable by the county: Coke's Institutes, 2nd part, pp. 697, 700. At common law there is no liability, and therefore no obligation on any one to repair this bridge. The county has no legal right to repair: *Sutcliffe* v. *Surveyors of Sowerby* (3), where an alteration made in some stepping-stones by putting flags on them was held not justified. The dedicator of the bridge was not intended by law to be burdened with the repair: *Reg.* v.

(1) (1887) 19 Q. B. D. 590. (2) (1852) 18 Q. B. 841, 856.
(3) (1859) 1 L. T. (N.S.) 7.

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*Wilson.* (1) Where there is no obligation to repair, there can be no right to repair: *Eyre* v. *New Forest Highway Board.* (2) Even a public authority cannot repair a pathway, or enlarge a highway, if it is under no liability to repair: *Robertson* v. *Bristol Corporation.* (3) The defendants, as members of the public, being under no liability to repair this bridge, had no right to do so; they ought to have taken proceedings against the person or body who is liable to repair, whoever that person or body may be: for these reasons the plaintiff is entitled to an injunction.

*S. T. Evans, K.C.*, and *John Lloyd*, for the defendants. Upon the finding of the jury, this footbridge carried a highway over the river; the inference is that this bridge was a public footbridge, and that, therefore, the county is under an obligation to repair it, unless it can be shewn that some one else is liable: Viner's Abridgment, vol. iv. p. 282, (A) Bridges. The bridge having been broken down, the defendants, as members of the public, had a right to try and pass over, and, finding a nuisance existing on this highway, they were entitled to abate the nuisance by re-erecting the bridge. It is a nuisance if a highway be allowed to fall into bad repair: Hawkins' Pleas of the Crown, 8th ed. vol. i. p. 692. Any individual member of the public has a right to abate a nuisance on the highway: Lilly's Abridgment, 2nd ed. vol. ii. p. 306, Nusance; Wood's Institute, p. 443. A negative nuisance may be abated equally with a positive one: Viner's Abridgment, vol. xvi. p. 20, Nusance, (B) 5, and p. 40 (W), 4, 9. To suffer a public bridge to be in decay is a public nuisance which may be abated by those who are prejudiced by it; they are not bound to wait, and indict the public authority.

[COLLINS L.J. *Colchester Corporation* v. *Brooke* (4) seems to shew that in the case of a public nuisance the ordinary remedy is the public one of indictment.]

A member of the public may remove a gate across a highway which prevents his passage, as stated in *Colchester Corporation* v. *Brooke* (4), and he may, in like manner, replace a bridge, and

(1) (1852) 18 Q. B. 348.
(2) (1892) 56 J. P. 517.
(3) [1900] 2 Q. B. 198.
(4) (1845) 7 Q. B. 339, 377.

so put an end to a nuisance which the public have a right to remove.

[COLLINS L.J. You must shew special damage to justify your interference as a private individual: *Dimes* v. *Petley*. (1)]

The individual desiring to pass over does suffer special damage. There is no distinction between a road impassable through non-feasance, e.g., by neglect of repair, and a road impassable through misfeasance: *Dawes* v. *Hawkins*. (2) If the county is liable for the repair of this bridge, the remedy is by indicting the inhabitants at large, so that the defendants as some of the inhabitants could be indicted, and are therefore justified in repairing without indictment. If it is established that there is a right of way on the part of the public, the liability to repair follows: *Eyre* v. *New Forest Highway Board*. (3) The cases relied on by the plaintiffs as to the liability and consequent right to repair are distinguishable. *Reg.* v. *Inhabitants of County of Southampton, Tinker's Bridge* (4), was decided on the question of fact, and in *Sutcliffe* v. *Surveyors of Sowerby* (5) what was done was in excess of what was there before. So long as no additional burden is imposed, a nuisance like this can be abated. There is no difference in principle between abating a nuisance by removing an obstruction, and abating a nuisance by replacing a few planks across a stream. The defendants have imposed no additional burden upon any one, or done more than was necessary to enable them, as members of the public, to cross over the river.

*Swinfen Eady, K.C.*, in reply. An action cannot be maintained for an obstruction to a public highway by the party obstructed—the remedy is by indictment: *Hubert* v. *Groves*. (6) To maintain an action for obstructing a highway, the plaintiff must shew special damage peculiar to himself beyond mere delay on several occasions when passing along it: *Winterbottom* v. *Lord Derby*. (7) As to the contention that the defendants might be liable to an indictment, that is not good,

(1) (1850) 15 Q. B. 276, 283.
(2) (1860) 29 L. J. (C.P.) 343.
(3) 56 J. P. 517.
(4) 18 Q. B. 841.
(5) 1 L. T. (N.S.) 7.
(6) (1794) 1 Esp. 148.
(7) (1867) L. R. 2 Ex. 316.

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an indictment against individual inhabitants would be bad: Hawkins' Pleas of the Crown, 8th ed. vol. i. p. 706. There is an important distinction between removing an obstruction which has been wrongfully placed, or allowed to grow, in a highway and making good by a permanent structure the result of a mere non-feasance: *Earl of Lonsdale* v. *Nelson* (1), *Lemmon* v. *Webb*. (2) [He also referred to 2 Roll. Abr. p. 141, Nusans (H), pl. 8 and 9.] The defendants' remedy was by indictment, and upon the findings of the jury the plaintiff is entitled to an injunction to restrain the defendants from doing anything to this bridge.

*S. T. Evans, K.C.*, replied on the fresh cases cited for the plaintiff.

*Cur. adv. vult.*

July 15. RIGBY L.J. said the appeal would be allowed for the reasons given by the Lords Justices, with whose written judgments he agreed.

COLLINS L.J. This was an action of trespass by erecting a bridge over the plaintiff's land consisting of one moiety of the bed of the river Irfon, in Wales. The defendants' pleas were "not possessed," and that there was a highway over the locus in quo by means of a footbridge, and the defendants, having occasion to use the said way, entered upon the locus in quo, and because the bridge had been destroyed, erected and laid a footbridge across the river, and necessarily did the acts complained of, without unnecessary damage, for the purpose of using the said highway. The jury found the issue on "not possessed" for the plaintiff, and the other issue for the defendants. On an appeal by the plaintiff to this Court, the finding for the defendants was impeached on various grounds, and in addition it was contended that, even accepting the findings, the defendants were not entitled to judgment. We decided to determine this point first, as, if the defendants are right upon it, it disposes of the action. It was contended for the plaintiff

(1) (1823) 2 B. & C. 302; 26 R. R. 363. (2) [1895] A. C. 1, 8.

that, assuming it to be the fact that a highway for foot passengers by means of a footbridge across the river existed, the fact that that bridge had been destroyed gave no right to the defendants to come upon the plaintiff's land and erect a new one. I think this contention is well founded. Though there was evidence that a bridge had once existed at the place in question, and the jury found that there was a highway over it, it was proved that for many years before 1898 that bridge had ceased to exist. In that year the defendants had erected a footbridge in the place where it now is, and the plaintiff had caused that part of it which passed over his land to be removed. The defendants had subsequently re-erected it in its present form across the plaintiff's land, and this action was brought. There was no proof of any right in, or obligation on, the defendants to repair the bridge, neither was there any proof of any such obligation on the plaintiff. The only right which the defendants set up is that which is averred in the plea. The defendants do not contend that they are in any better position than any other member of the public who, having occasion to use the way, finds there is no bridge where one once existed. The question is, therefore, whether in these circumstances a member of the public who wishes to cross is entitled, not merely by some temporary makeshift serving the particular occasion to get across, but to build a permanent structure on the plaintiff's land for that purpose. Mr. Evans, for the defendants, contended that it was simply a case of abating a nuisance from which he suffered a special inconvenience, such as was held to be justifiable as long ago as Cro. Car. 185, where a passenger was held entitled not only to open but to throw down a gate placed across a highway. But there is a broad difference between removing an obstruction, which has been wrongfully placed in the highway, and making good by a permanent structure the result of mere non-feasance on the part of those charged with the duty of repairing, and I doubt whether such an operation could properly fall under the term "abatement." Even if the right to "abate" can be said to exist at all in the case of a nuisance arising from mere non-feasance, as to which see the argument of

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Mr. Parke, afterwards Parke J., and the judgment of Best J. in *Earl of Lonsdale* v. *Nelson* (1), I do not think the cases which establish the right to abate by an individual for the purpose of passage would extend to protect such acts as were done by the defendants in this case. If this were the law, every individual who was obstructed in his desire to cross would be equally entitled to erect a permanent structure of his own design, although the obligation to repair and the incidental right to determine the method might be in other persons, who, moreover, might be reached by indictment. The right of abatement by individuals is not regarded with favour by the law. In the words of Lord Hale: "But because this many times occasions tumults and disorders, the best way to reform public nuisances is by the ordinary Courts of justice": see this cited in *Earl of Lonsdale* v. *Nelson*. (2) "If," says Lord Campbell in *Dimes* v. *Petley* (3), "there be a nuisance in a public highway, a private individual cannot of his own authority abate it unless it does him a special injury, and he can only interfere with it as far as is necessary to exercise his right of passing along the highway; and, without considering whether he must shew that the abatement of the nuisance was absolutely necessary to enable him to pass, we clearly think that he cannot justify doing any damage to the property of the person who has improperly placed the nuisance in the highway, if, avoiding it, he might have passed on with reasonable convenience." Again, in *Colchester Corporation* v. *Brooke* (4) Lord Denman C.J., in delivering the judgment of the Court, says: "A public nuisance becomes a private one to him who is specially and in some particular way inconvenienced thereby, as in the case of a gate across a highway which prevents a traveller from passing, and which he may therefore throw down: but the ordinary remedy for a public nuisance is itself public, that of indictment; and each individual who is *only* injured as one of the public can no more proceed to abate than he can bring an action." It may be that, even in the case of the gate, an action could not have been maintained: see *Winterbottom*

(1) 2 B. & C. 302; 26 R. R. 363.
(2) 2 B. & C. 310.
(3) 15 Q. B. 283.
(4) 7 Q. B. 377.

v. *Lord Derby* (1), and that therefore there may, in the case of positive nuisance, be a right to abate where there is no cause of action, there being insufficient special damage. But the difference between public nuisances arising by commission and those arising by omission is in the view of the law radical, since in the latter case, however clear and special the damage to the individual, he can maintain no action: see in the case of a highway (Hawkins, P. C., 8th ed. vol. i. 707, citing Cowper, 687), a rule which has been followed in many recent cases: see *Cowley* v. *Newmarket Local Board.* (2) There would be nothing anomalous, therefore, if the rule were that the right to abate a nuisance to a highway does not apply to nuisances due to non-feasance by the repairing authority, and it is remarkable that no instance apparently can be found in the books of abatement in such a case, unless indeed that which Best J. described as an exception in *Earl of Lonsdale* v. *Nelson* (3) may be so called. An obstruction may be abated by removing it; but in the case which we have before us considerable constructive work would be necessary to place the road in its proper condition so as completely to get rid of the nuisance, and I doubt whether, if "abatement" can be said to include this, the right to abate in such a sense could be held to exist in the case of a nuisance by non-feasance which has resulted in the obliteration of part of a highway. This is by no means inconsistent with the right to deal with a difficulty in crossing on some particular occasion by putting down a plank or a stepping-stone, for to do this might well be a reasonable incident of the right of passage, and would throw no additional burden on the dedicating owner. But, however this may be, the right, if it exists, could not, I think, be extended to cover such acts as those admittedly done by the defendants in this case. It must always be borne in mind that the right of the public upon a highway is that of going and coming only, and the right of "abatement" in an individual is only ancillary thereto. The dedicating owner, therefore, is not bound to accept a greater burden, and may complain if it is imposed upon him. I think the appeal should

(1) L. R. 2 Ex. 316. (2) [1892] A. C. 345.
(3) 2 B. & C. 302; 26 R. R. 363.

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be allowed, and judgment entered for the plaintiff, with an injunction in the terms which will be stated by my brother Romer.

ROMER L.J. The point involved in this appeal is a short one. I will assume for the purposes of the appeal that there was formerly a bridge over the river Irfon, at or near the place where the bridge now in dispute was erected by the defendants, and that there was a public right of way over that old bridge, as found by the jury. But it is admitted by the defendants that the plaintiff was under no obligation to repair or replace the old bridge, and that they themselves were under no such personal obligation. It is contended by the defendants that the obligation to repair the old bridge, and to replace it when necessary, is in some local authority, and that consequently that local authority had the right to repair and replace. But admitting this contention to be true for the purposes of the point we have now to decide, it is clear, as pointed out by Wills J. in the case of *Eyre* v. *New Forest Highway Board* (1), that, where there is no obligation to repair, there can be (in the absence of any special power given) no right to repair. Although, therefore, the local authority may have the right to come upon the plaintiff's land for the purpose of re-erecting a bridge, the defendants have no such right to do so by virtue of any general right of repairing and replacing the bridge. And it is not established here that what the defendants did in entering upon the plaintiff's land and erecting a new bridge was by the direction and on behalf of the local authority, so that their act can be regarded as the act of the local authority. And, seeing that the plaintiff was under no obligation to repair or replace the bridge, he cannot be prejudiced by any default on the part of the local authority. The default of the local authority cannot extend the burden placed upon the plaintiff's land, and give to other persons a right to go on that land which could not have existed if the local authority had not been guilty of default. But then the defendants say that, though they may have had no right to enter upon the plaintiff's

(1) 56 J. P. 517.

land by virtue of any general right of repairing or replacing, they had, by virtue of the public right of way and as members of the public, a right to come to the place in question and try and pass over the river, and that, finding a legal nuisance existing by reason of the fact that the old bridge had been allowed to decay and disappear, they had a right to abate the nuisance by re-erecting the bridge. This is a very far-reaching contention on the part of the defendants, and, if well founded, might lead to strange results. For instance, a local authority, bound and entitled to repair a bridge which falls suddenly into need of extensive repair, or is swept away by a flood, and properly taking advice as to the best means of repairing or re-erecting the bridge, might find itself forestalled by the impatience of some member of the public who wanted to pass over, and some repairs executed or new bridge put up of which the local authority wholly disapproved. It cannot be that in such a case the first member of the public who happens to come to the bridge to pass over has a right to do extensive works, if he chooses to bear the expense. And, if the works necessitate an entry on land of a private owner not part of the highway, it appears to me that it cannot be that any member of the public has a right to go on that land for the purpose of repairing or replacing the bridge. I think that there must be some limitation of the alleged right of abating a legal nuisance of the kind that I am now considering. In *Earl of Lonsdale* v. *Nelson* (1) Best J. said that there was no decided case which sanctions the abatement by an individual of nuisances of omission, except that of cutting the branches of trees which overhang a public road, or the private property of the person who cuts them. This authority has been observed upon by Lord Davey in *Lemmon* v. *Webb*. (2) But, whether or not Best J. was justified in stating or suggesting that there was such a general rule as he indicated, or whether or not to such a rule, if it exists, there may not be other exceptions than the cutting of trees, I do not think we need decide in this case. For I think that where the question concerns a substantial structure, such as the bridge erected in this case, and where the abatement of

(1) 2 B. & C. 311.

(2) [1895] A. C. 8.

C. A. 1901 CAMPBELL DAVYS v. LLOYD. Romer L.J.

the nuisance cannot be effected in ordinary course by the individual going upon and passing along the highway in the way in which he has the right as a member of the public, and where he has (as in the case before us) in order to erect the structure to go and remain and do work upon land, in a manner not justified by the mere exercise of the public right of way, and the land belongs to a person who is not guilty of causing the nuisance, then he cannot justify the entry on the land, and the erection of the structure as against the owner of the land, by alleging that he was abating a nuisance. I think, therefore, that in this case the defendants were not justified in entering upon the plaintiff's land and erecting their bridge upon it, and that consequently their act was wrongful as against the plaintiff, and entitled him to remove the bridge so far as it was erected on his land. I agree in thinking that the appeal should succeed, and that, notwithstanding the findings of the jury, the judgment for the defendants must be set aside. There must be an injunction restraining the defendants, their agents and servants from preventing the plaintiff from removing from his land the bridge erected by them. The plaintiff should get the costs of the appeal. He will also get the general costs of the action, except the costs of the issue as to the right of way, which will be paid by him, with set-off.

Solicitors: *Riddell & Co.; J. B. Somerville, for A. Gwynne-Vaughan, Builth.*

W. C. D.

C. A.
1901
July 8;
Aug. 1.

## *In re* HAYES.
## TURNBULL *v.* HAYES.

[1899 H. 3885.]

*Will—Power of Appointment—Limited Power—Special Power—Execution of Power—General Gift—"Disposing Power"—Power Non-existent at Date of Will—Exercising Power by Anticipation—Intention.*

H. H. the younger, by his will dated in 1884 and confirmed by a codicil dated in March, 1893, gave "all the residue of the property over which at the time of my death I shall have a disposing power" to trustees upon trust for sale, conversion and investment, and directed them to pay the yearly income arising from his trust estate to his wife for life or widowhood, and subject to the trust aforesaid to stand possessed of his trust estate upon trusts for his children.

H. H. the elder, the father of H. H. the younger, by his will, dated in June, 1893, empowered each child of his by his or her will, or any codicil thereto, to appoint in favour of his or her wife or husband the whole or any part of the yearly income of his or her share of his (the testator's) residuary estate for the life of such wife or husband, and directed that a sum of 4000*l.* thereby directed to be raised should be held upon the same or the like trusts and subject to the same or the like powers and provisions as were thereinbefore declared with respect to the share of his son H. H. the younger in the residue.

H. H. the elder died in 1895, and H. H. the younger in 1899 leaving a widow and three children. H. H. the younger had no power of appointment exercisable in favour of his widow other than the power contained in the will of his father:—

*Held*, that the language of the will of H. H. the younger was not sufficient to shew an intention to execute a non-existent special power, and accordingly that his will did not operate as an appointment under the power given him by the will of his father.

Whether it is possible, as a matter of law, to execute by anticipation a special power not created until after the alleged execution, *quære*.

Decision of Byrne J., [1900] 2 Ch. 332, affirmed.

APPEAL from the decision of Byrne J. (1)

*Upjohn, K.C.*, and *A. Adams*, for the appellant, the widow of Henry Hayes the younger. The learned judge has held, first, that the testator, Henry Hayes the younger, has shewn

(1) [1900] 2 Ch. 332.

C. A. 1901 HAYES, *In re.* TURNBULL *v.* HAYES.

no intention to exercise his special power; and, secondly, that as his will was dated prior to the creation of the special power, it did not operate as a valid execution of the power.

As regards the learned judge's first point, quite apart from s. 24 or s. 27 of the Wills Act, 1837 (1 Vict. c. 26), the testator's clear intention was, as he says, to exercise all such powers as he had; it was not necessary to refer to the particular power; he was aware of the power before his death, and he allowed the will to stand; moreover, he had no power except that given him by his father's will: *Pidgely* v. *Pidgely* (1); *Cowx* v. *Foster* (2); *In re Teape's Trusts* (3); *Thornton* v. *Thornton* (4); *Price* v. *Price* (5); *In re Swinburne* (6); *Von Brockdorff* v. *Malcolm* (7); *In re Milner* (8); *In re Sharland* (9); *In re Mayhew* (10); *In re Wells' Trusts* (11); *In re Cotton* (12); Theobald on Wills, 5th ed. pp. 223–24.

Then as to the learned judge's second point, that the power created by the father's will was not in existence either at the date of the son's will or of the codicil confirming it, there is no reason why a man, in making a will, should not thereby exercise a power by anticipation. If he does not alter his will, his presumed intention is that it shall operate from day to day so as to be applicable to the state of things for the time being: *In re Radcliffe* (13); *In re Somes* (14); *Cave* v. *Cave* (15); *In re Blackburn* (16); Sugden on Powers, 8th ed. p. 262, pl. 5.

*H. Terrell, K.C.*, and *D. D. Robertson*, for the infant child of Henry Hayes the younger, representing all his infant children, and for the trustees. First, a special power, such as we have here, is a power in the nature of a trust, and cannot be exercised by anticipation by the donee. It is a discretionary trust, so that when the power actually comes into existence, the

(1) (1844) 1 Coll. 255.
(2) (1860) 1 J. & H. 30, 35.
(3) (1873) L. R. 16 Eq. 442, 446.
(4) (1875) L. R. 20 Eq. 599.
(5) (1882) 46 L. T. 228.
(6) (1884) 27 Ch. D. 696.
(7) (1885) 30 Ch. D. 172.
(8) [1899] 1 Ch. 563, 565.
(9) [1899] 2 Ch. 536.
(10) [1901] 1 Ch. 677.
(11) (1889) 42 Ch. D. 646.
(12) (1888) 40 Ch. D. 41.
(13) [1892] 1 Ch. 227.
(14) [1896] 1 Ch. 250.
(15) (1856) 8 D. M. & G. 131.
(16) (1889) 43 Ch. D. 75.

donee must use his discretion as to the mode of exercising it for the benefit of the objects of it: *Walker* v. *Armstrong* (1); *Cowper* v. *Mantell* (2); *Thomas* v. *Jones* (3); *Doyle* v. *Coyle*. (4) No doubt, in *Stillman* v. *Weedon* (5) it was held that ss. 24 and 27 of the Wills Act included special as well as general powers, and that a will, though made before the creation of the power purported to be exercised by it, was a good execution of the power; but that case is criticised by Lord St. Leonards in Sugden on Powers, 8th ed. pp. 306–7, pl. 48, 49, and also in *Doyle* v. *Coyle* (4), and it cannot be regarded now as good law. As to *In re Blackburn* (6) and *Cave* v. *Cave* (7), the real decision in those cases was that the persons who purported to exercise the special powers in question could not exercise them by anticipation; and so in Farwell on Powers, 2nd ed. p. 226.

But even if we are wrong on our first point, we contend, secondly, on the facts, that the power has not been exercised. The question is one of intention, and little assistance is to be gained from decisions upon other wills differing in form and expression: *In re Milner*. (8) And in none of the cases are the circumstances the same as here. Here the testator has not "a disposing power": all he has is a power of selection. Having regard to the whole will, it is impossible to come to the conclusion that the donee had present to his mind the existence of any power at all.

*Upjohn, K.C.*, in reply. A power of this kind is only fiduciary to this extent, that the donee must act in good faith and have regard to the objects of the donor in creating the power: *Duke of Portland* v. *Topham* (9); *Brown* v. *Higgs*. (10) All the authorities on the point are collected in Theobald on Wills, 5th ed. pp. 223, 224.

[ROMER L.J. The intention to exercise a special power

(1) (1856) 21 Beav. 284, 305.
(2) (1856) 22 Beav. 223, 229.
(3) (1862) 1 D. J. & S. 63, 78.
(4) [1895] 1 I. R. 205.
(5) (1848) 16 Sim. 26.
(6) 43 Ch. D. 75.
(7) 8 D. M. & G. 131.
(8) [1899] 1 Ch. 563, 566.
(9) (1864) 11 H. L. C. 32.
(10) (1803) 8 Ves. 561, 570, 574; 4 R. R. 337.

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must be gathered from the whole will. The cases do not lay down any general principles and are not easily reconcilable. That seems to sum up the true position.]

In addition to the authorities already cited, he referred, upon the question of intention, to *Re Denton* (1), *Hope* v. *Hope* (2), and Sugden on Powers, 8th ed. p. 310, pl. 53; and upon the point as to the exercise of a special power by anticipation, he asked their Lordships to hold that a man might look forward and exercise a special power that might be existing at his death though not at the date of his will.

*Cur. adv. vult.*

Aug. 1. The judgment of the Court (Rigby, Collins, and Romer L.JJ.) was delivered by

COLLINS L.J. The question in this case is whether the will of Henry Hayes the younger operated as a good execution of a special power conferred on him by the will of his father, Henry Hayes the elder, whereby he was empowered to appoint a life interest in certain funds to his wife. Henry Hayes the younger made his will on December 29, 1884. In March, 1893, he made a codicil confirming it, and he died in September, 1899. His father, Henry Hayes the elder, made his will on June 10, 1893, and he died in April, 1895. Thus, at the date of the son's will and of the codicil confirming it, the power created by his father's will had not come into existence. The material clauses in the two wills are fully set out in Byrne J.'s judgment, and we need not refer to them at length here. We think it is quite clear from the authorities cited by Byrne J. that the case is not within s. 27 or s. 24 of the Wills Act, and indeed Mr. Upjohn for the appellant did not contest this. The case, therefore, must be decided altogether apart from the special provisions of the Wills Act. There is, therefore, no legal presumption of intention. Nor is it, we think, necessary to decide whether it is possible, as a matter of law, to execute by anticipation a special power which has not been

(1) (1890) 63 L. T. 105. (2) (1854) 5 Giff. 13.

created till after the alleged execution. For, even if it be possible to do so—as to which see per Lord Romilly M.R. in *Walker* v. *Armstrong* (1) and *Cowper* v. *Mantell* (2)—it could only be deemed to be executed in this case if an intention to execute it could be fairly collected from the words of the will of Henry Hayes the younger taken as a whole. See *In re Milner*. (3) And, in looking for such an intention in the case of a special power, where the statute does not aid it, we necessarily, as it seems to us, start with a presumption against it where the will which is said to execute the power has been made before the power came into existence. Further, in the case of a special power, giving to the donee the right of determining in which of two or more directions a certain fund shall fall, even though the power could not be said to be strictly fiduciary, there is, we think, at the lowest, a presumption that the donee could not have intended to execute such a power at a time when he could not know the conditions or limitations imposed by the donor. It would require, therefore, as it seems to us, very clear indications in the language of the will to found an inference of intention to execute a special power under such circumstances.

In the present case the passage in the will of Henry Hayes the younger from which the intention to execute the power is to be inferred, if at all, runs as follows: "And subject to the payment of the said legacies I give all the residue of the property over which at the time of my death I shall have a disposing power unto my trustees upon trust in their discretion to sell and convert the same into money in such manner and upon such conditions as they shall think fit." There is nothing else in the will which favours the inference. On the contrary, there are difficulties to be got over in the language of the other parts of the will, if they are to be held consistent with the alleged intention. We need not repeat them, as they are pointed out in the judgment of Byrne J. And though, as is usual in these cases, many authorities were cited to shew that these difficulties have severally been surmounted when

(1) 21 Beav. 305. (2) 22 Beav. 223.
(3) [1899] 1 Ch. 563.

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construed in other contexts in other wills, the result cannot be put higher than as shewing that they would not suffice to defeat an otherwise well-founded inference.

Coming back then to the words which are said to refer to the power and to shew an intention to exercise it, we think they cannot be fairly construed as disclosing an intention to execute a non-existent special power. And, taking the whole will together, we think the balance distinctly inclines against such an inference. At all events, there is no such clear preponderance in favour of the intention as to warrant us in differing from the opinion of Byrne J. The appeal, therefore, fails.

Solicitors: *Bell, Brodrick & Gray, for Buchannan & Sons, Whitby.*

G. I. F. C.

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*In re* NEW.

[1901 N. 556.]

*In re* LEAVERS.

[1901 L. 922.]

*In re* MORLEY.

[1901 M. 1362.]

*Trustees—Trust Estate—Business—Shares in Limited Company—Administration—Management—Powers—Investment—Reconstruction Scheme—Concurrence of Trustees—Exchange of Shares of old Company for Shares in new—Cestuis que Trust, Interests of—Parties under Disability—Realization of Shares—Retainer of Shares—Sanction of Court—Jurisdiction.*

Where in the administration or management of a trust estate by the trustees, especially where the estate consists of a business or of shares in a mercantile company, there arises an emergency or a state of circumstances which it may reasonably be supposed was not foreseen or anticipated by the author of the trust and is unprovided for by the trust instrument, and which renders it desirable and perhaps even essential, in the interests of the beneficiaries, that certain acts should be done by the trustees which they themselves have no power to do, and to which the consent of all the beneficiaries cannot be obtained by reason of some not being sui juris or not yet in existence, the Court will exercise its general administrative

jurisdiction by sanctioning, on behalf of all parties interested, those acts being done by the trustees.

Thus, the Court authorized the trustees of three separate trust instruments to concur in a shareholders' scheme for the reconstruction of a prosperous limited company, shares in which, settled by the settlor or testator in each case, had become vested in the trustees, it being proposed that all the shareholders in the existing company should exchange their shares, all of which were fully paid, for more realizable shares (fully paid) and debentures in the proposed new or reconstructed company. The evidence shewed that the scheme would be greatly to the advantage of all parties interested under the several trusts, including infants and unborn persons. In one of the three cases the trustees had power, under the trust instrument, to invest in shares or debentures of such a company as the proposed new company. In the two other cases, as the trustees had no such power, the Court put them on an undertaking to apply for leave to further retain the shares and debentures they would obtain under the scheme, if they desired to retain them beyond one year from the time the reconstruction should be carried into effect.

*In re Crawshay*, W. N. (1888) 246, 251; 60 L. T. 357, and *In re Morrison*, [1901] 1 Ch. 701, considered.

By a settlement dated October 21, 1875, David New, in consideration of his natural love and affection for his daughters thereinafter named, covenanted with two trustees that he would forthwith, or as soon as circumstances would permit, transfer into their names certain shares in three limited companies, including 110 fully paid shares of the nominal value of 100*l.* each in the Wollaton Colliery Company, Limited, or so many of them respectively in respect of which any right of pre-emption conferred by the articles of association of the said companies respectively should not be exercised, and, in the event of such right of pre-emption being exercised as to any of the said shares respectively, would, immediately upon receipt of the purchase-money or moneys thereof, pay over the same unto the said trustees, their executors, administrators or assigns, upon trust either to permit the whole or any of the said shares respectively which should be transferred under the covenant thereinbefore contained to remain in their actual state of investment, or at any time or times, at the discretion of the trustees or trustee for the time being, to sell the same or any of them, and invest the moneys produced thereby, and also any purchase-moneys received under the covenant thereinbefore contained, in or upon any of the securities therein mentioned,

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including the debentures or debenture or guaranteed or preference stocks or mortgages of any company in the United Kingdom paying dividends on its ordinary shares or stock at the time of investment, with power to vary such investments at their or his discretion, and to divide the said trust funds and the investments thereof into two equal shares, and to pay the income of one such share to each of the two unmarried daughters of the said D. New during her life for her sole and separate use without power of anticipation, and after her death to stand possessed of her share and the income thereof in trust for her children equally, as therein mentioned; and after certain conditional limitations in favour of a married daughter of the testator, the settlor reserved a power of revocation and new appointment.

By a deed of revocation and new appointment, dated August 31, 1877, the settlor declared that the settlement should be read and take effect as if the name of the married daughter had been originally inserted therein instead of one of the unmarried daughters who had died.

The settlor, D. New, died on September 28, 1878.

The said 110 shares of 100*l.* each in the Wollaton Colliery Company, Limited, were duly transferred by the settlor into the names of the trustees of the settlement, and were now still standing in the same names.

John Wells Leavers, who died on August 13, 1897, by his will dated October 4, 1892, after appointing his widow and others executors and trustees, and making certain bequests, devised and bequeathed his residuary real and personal estate to his said trustees upon trust (but during the life of his widow with her consent in writing) for sale (but subject to the proviso thereinafter contained) and conversion, and out of the moneys produced thereby to pay his funeral and testamentary expenses and debts, and to invest the residue of the said moneys in their names or under their legal control in or upon any of the securities therein mentioned, including the stocks, funds, shares, debentures, debenture stock, mortgages or securities of any corporation, company, or public body or authority, municipal, local, commercial, or otherwise, in the

United Kingdom, with power to vary such investments, and upon trust to pay the income of the said residuary moneys and investments to his said wife during her life, and after her decease to stand possessed of the said trust premises upon trust for payment of certain legacies, and to pay the residue of the said trust moneys and investments to his and his said wife's nephews and nieces therein named in equal shares. And the testator, after directing payment of legacies free of duty and providing against lapse, provided and declared that his trustees at their own absolute discretion might permit all or any part of his personal estate to continue in the same state of investment in which it should be found at the time of his decease, notwithstanding the same or any of them might be of a wasting or hazardous nature, and not allowed by law for the investment of trust moneys; and it was his express wish that his trustees should in all matters of investment act in the same manner in all respects as if they were alone beneficially and absolutely interested therein without being responsible for loss. And the testator also declared that it should be lawful for his trustees to postpone the sale and conversion of the whole or any part or parts of his real and personal estate as long as they should in their uncontrolled discretion think proper.

The testator's residuary estate included 228 fully paid shares of the nominal value of 100*l.* each in the Wollaton Colliery Company, Limited, above mentioned.

Samuel Morley, who died on March 12, 1890, by his will dated June 3, 1881, after appointing executors and giving legacies to his nephew and nieces therein named, devised and bequeathed his real and personal estate to his executors, upon trust for sale and conversion, with power to postpone such sale and conversion for such period as his trustees should think proper, and directed them out of the moneys to arise from such sale and conversion to pay his funeral and testamentary expenses, debts, and legacies, and to stand possessed of the residue of the said moneys upon trust thereout to set apart certain sums therein mentioned, to be held upon the trusts therein declared thereof; and to invest the whole of the residue of the said moneys in their names in or upon any of the

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securities therein mentioned, including the preference or wholly or partially guaranteed stock or shares, or the bonds, mortgages or debentures, or the debenture stock of any railway or other public company in Great Britain incorporated by special Act of Parliament, and having within one year of the time of investment paid a dividend on its ordinary stock or shares, with power to vary such investments. And the testator directed his trustees to stand possessed of the said investments and of the annual income thereof upon the trusts therein declared.

The testator's residuary estate included 166 fully paid 100*l.* shares in the Wollaton Colliery Company, Limited, above mentioned.

In the year 1896 the company entered upon a period of great prosperity. The dividends, with bonuses, in respect of the shares, for the five years 1896 to 1900 had been gradually increasing, the dividends for the year 1900 standing at 25 per cent. with 25 per cent. bonus. The result was that the market price of each 100*l.* share had risen to 175*l.*, so that the holdings of the trustees of the three several trust instruments had become of very great value.

The company was incorporated in the year 1875 under the Companies Acts with a nominal capital of 105,000*l.* in 1050 shares of 100*l.* each, and its paid-up capital amounted to 100,000*l.* Its assets, which consisted of leasehold collieries, stores, book debts, and goodwill, were valued at a sum exceeding 300,000*l.* In consequence of the constantly increasing dividends earned by the company and the large outlays which it had been necessary to make from time to time out of profits in developing the collieries, it had been considered desirable, in the interests of the shareholders, that the company should be reconstructed under a scheme by which it was proposed to recapitalise the company at a higher figure, and, in effect, split up each 100*l.* into shares of smaller nominal value which could be more easily realized or dealt with.

Accordingly, a scheme was prepared by which it was proposed to wind up the existing company voluntarily and dissolve it, and to incorporate a new company under the name of "The Wollaton Collieries Company, Limited," with a capital of

210,000*l.* in 10,000 preference shares of 10*l.* each and 11,000 ordinary shares of 10*l.* each, and to authorize the issue of debentures to the amount of 150,000*l.* of which 100,000*l.* would be issued to the shareholders of the old company, 50,000*l.* being reserved for future issue; and that the whole of the assets of the old company should be transferred to the new company. The present directors of the existing company were to be the first directors of the new.

The shares in the existing company were to be exchanged for fully paid-up preference shares and ordinary shares and debentures of the new company, on the footing that each shareholder should be entitled, in exchange for each of his existing 100*l.* shares, to ten fully paid-up 10*l.* preference shares, ten fully paid-up 10*l.* ordinary shares and a 100*l.* debenture of the new company. The preference shares were to carry a non-cumulative dividend at 6 per cent. per annum on the capital paid up thereon and to rank, both as regards dividend and capital, in priority to the other shares, and up to 10 per cent. on the amount of such preference shares, and no further, to participate pari passu with the other shares in the assets available for distribution in the winding-up, after paying off the whole of the paid-up capital of the existing company. The debentures were to carry interest at 5 per cent. per annum and be secured by a floating charge on the undertaking, and be redeemable by annual drawings at a premium of 5 per cent. All the shareholders of the existing company who were sui juris had signified their approval of the scheme.

The trustees of the three several trust instruments were desirous, in the interests of their respective cestuis que trust, of whom some were persons not sui juris and others were persons not yet in existence, of obtaining the sanction of the Court to their concurrence in the proposed scheme of reconstruction of the company, which they said would be advantageous to all the shareholders; and also of obtaining the direction of the Court as to retaining permanently or otherwise as trust investments the preference and ordinary shares and debentures of the new company, or any of them, that should be issued in exchange for the shares in the existing company.

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Accordingly, originating summonses were taken out in the matter of New's settlement, in the matter of Leavers' will, and in the matter of Morley's will respectively, the plaintiffs in each case being the trustees, and the defendants being parties (including infants) interested under the trusts of the settlement and of the residuary estates of the two testators. The summons in each case asked for the determination of the following questions: (1.) whether the plaintiffs, as holders of fully paid shares of 100*l.* each in the existing company, ought to ratify the proposed reconstruction scheme, which was embodied in a conditional agreement between a shareholder in the existing company (representing the general body of shareholders) and a nominee on behalf of the proposed new company; (2.) that the plaintiffs, as the holders of such shares, might be authorized to ratify the agreement; (3.) that the plaintiffs might be authorized to accept, in exchange for each of the shares in the old company, ten fully paid 6*l.* per cent. non-cumulative preference shares of the new company (with preference as to dividend and capital) and ten fully paid ordinary shares of the new company, and a 100*l.* 5 per cent. debenture of the new company; (4.) whether the plaintiffs, as such trustees, had power to retain permanently such preference and ordinary shares and debenture; and (5.) if not, for what period they might hold such preference and ordinary shares and debenture.

In support of the several summonses the several trustees filed affidavits setting forth the rise in the annual dividends and bonuses, and the consequent rise in value of the existing shares, and the details of the reconstruction scheme; and stating that they had been advised that, although there was a market for the shares of the existing company, it would be disastrous to attempt to realize any large proportion of the securities of the new company, when issued, by placing them on the market at once; and for that reason they desired to obtain leave to retain such securities when obtained, subject to the directions of the Court as to realization after a period of postponement or otherwise, as might be deemed expedient.

The three summonses came before Cozens-Hardy J. in chambers on June 17, 1901, when his Lordship refused the

applications, but intimated that he would have made the orders had he not felt himself bound by the decisions in *In re Morrison* (1) and *In re Crawshay* (2); but he expressed the hope that, for the assistance and guidance of judges of first instance, the cases would be carried to the Court of Appeal.

The plaintiffs in the three summonses then appealed separately.

The appeals were heard on July 8, 1901.

*Haldane, K.C.*, and *Peterson*, for the appellants. The several trustees are in this difficulty—that, if they do not assent to the scheme, they will be at the mercy of the other shareholders, who could still wind up the company, and under s. 161 of the Companies Act, 1862, could buy the trustees out; but, as the evidence shews, it is in the interests of the beneficiaries that the trustees should continue to hold their shares. That being so, the case is one in which the Court can exercise its jurisdiction to compromise rights of infants and persons under disability. The broadest statement of the jurisdiction is to be found in *Brooke* v. *Lord Mostyn* (3), where Turner L.J. states the principles on which such compromises may be made. He says that the power of the Court to compromise rights of infants and persons under disability results from the jurisdiction the Court exercises over trustees; and that in the exercise of that jurisdiction the Court may, in general, order the trustees to deal with the trust property in whatever mode it may consider to be for the benefit of the cestuis que trust who are infants or under disability. That principle was applied by Fry J. in *West of England and South Wales District Bank* v. *Murch* (4), which was a case under the power to compromise contained in s. 30 of Lord Cranworth's Act (23 & 24 Vict. c. 145); but a still wider power to compromise is now contained in s. 21, sub-s. 2, of the Trustee Act, 1893 (56 & 57 Vict. c. 53). There can be no doubt that the Court has power, not only to compromise on behalf of persons

(1) [1901] 1 Ch. 701.
(2) W. N. (1888) 246, 251; 60 L. T. 357.
(3) (1864) 2 D. J. & S. 373, 415.
(4) (1883) 23 Ch. D. 138.

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under disability, but also to deal with their property. For instance, it may elect for an infant, or may convert his realty into personalty or his personalty into realty: *Attorney-General* v. *Marquis of Ailesbury*. (1) So in the present case, supposing there were a hostile claim against the trust estates which might cause them loss, such as a claim by the other shareholders to buy out the trustees, the Court might authorize the trustees to do some act to get rid of or compromise that hostile claim, although the act might not be strictly within the trustees' powers. It is true that the trustees cannot, in strictness, invest in the shares of a company not already incorporated, but supposing the proposed company had been incorporated, the trustees could, at least in the case of Leavers' will, have invested in the proposed securities. The company proposed to be incorporated is virtually the same as the existing company, though in an improved form and organisation which will be far more beneficial to the shareholders. In the cases of New's settlement and Morley's will, no doubt, the trustees have not the same wide powers of investment. Strictly speaking, therefore, they must realize as directed by their trust; but they have a power to postpone realization, and therefore the Court might authorize them to retain, at least for a certain period, the securities they will take in exchange for their present holding. *In re Crawshay* (2) was a different case. There it was proposed to form a testator's business into a company, which North J. held the trustees had no power to do; whereas here the business is a company already formed in the lifetime of the settlor or testator, he having held shares in that company. It is not a question of taking shares outside the scope of the authority given by the settlor or testator to his trustees, but of their taking precisely what they had before, though in a different form, the question being really one of form only. In *In re Morrison* (3) Buckley J. felt himself bound to follow *In re Crawshay* (2), considering he had no jurisdiction to sanction the proposed arrangement, however expedient and beneficial

(1) (1887) 12 App. Cas. 672, 681. (2) W. N. (1888) 246, 251; 60 L. T. 357.
(3) [1901] 1 Ch. 701.

it might be. In the present case Cozens-Hardy J. would have willingly made the order we ask had it not been for the two authorities referred to.

In Palmer's Company Precedents, 7th ed. Part I. pp. 606–613, are given a number of orders in unreported cases in which similar schemes have been sanctioned. We submit that what Cozens-Hardy J. desired to do ought, in the interests of all parties concerned, now to be done.

*R. J. Parker*, for all the defendants sui juris. We all agree that it is to the advantage of every one that this scheme should be carried out, and the only difficulty is that some of the beneficiaries are not sui juris and therefore cannot consent. If the broad principle were adopted that where trustees cannot do a particular thing the Court cannot do it, the advantages arising out of the equitable jurisdiction of the Court of Chancery would disappear. But, as a matter of practice, the Court has been in the habit of acting on the principle that it has power to deal with the property of cestuis que trust who are under disability, that is, in a proper case—on a special case being made, although not provided for in the trust—when the Court is satisfied that what is proposed is most advantageous to those cestuis que trust.

[ROMER L.J. The principle seems to be this—that the Court may, on an emergency, do something not authorized by the trust. It has no general power to interfere with or disregard the trust; but there are cases where the Court has gone beyond the express provisions of the trust instrument—cases of emergency, cases not foreseen or provided for by the author of the trust, where the circumstances require that something should be done.]

The principle apparently laid down in *In re Morrison* (1) is that the Court has no power to do that which, in trustees, would be a breach of trust; but the true principle, I submit, is that trustees may, with the sanction of the Court, do what would otherwise, without that sanction, be a breach of trust. Here, the real object of the proposed scheme is to enable the trustees more readily to effect a realization of their trust

(1) [1901] 1 Ch. 701.

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securities. Under the reconstruction everything will be substantially the same as at present, except an alteration in the amount and description of the shares: otherwise there will be the same property, the same organisation, the same government. Under the scheme there will be a security which can be easily realized, and all the trustees need do is to apply to the Court as to what should be done with the shares and debentures they will receive in exchange.

[ROMER L.J. I doubt very much whether this is an emergency case. By the scheme the nominal amount of the shares is to be increased.]

[*Haldane, K.C.* Within the last few years 60,000*l.* has been spent out of profits on capital account. We could prove that by affidavit, if necessary.]

[ROMER L.J. I think some reason should be shewn for going to reconstruction beyond the mere desire to increase the nominal amount of the shares.]

*J. W. Manning*, for the infant defendants.

*Cur. adv. vult.*

July 22. The judgment of the Court (Rigby, Collins, and Romer L.JJ.) was delivered by

ROMER L.J. As a rule, the Court has no jurisdiction to give, and will not give, its sanction to the performance by trustees of acts with reference to the trust estate which are not, on the face of the instrument creating the trust, authorized by its terms. The cases of *In re Crawshay* (1), decided by North J., and *In re Morrison* (2), decided by Buckley J., are instances where the Court was asked to sanction steps to be taken by trustees which it thought unjustifiable, and which it declared it had no jurisdiction to authorize. But in the management of a trust estate, and especially where that estate consists of a business or shares in a mercantile company, it not infrequently happens that some peculiar state of circumstances arises for which provision is not expressly made by the trust instrument, and which renders it most desirable, and it may

(1) W. N. (1888) 246, 251; 60 L. T. 357. (2) [1901] 1 Ch. 701.

be even essential, for the benefit of the estate and in the interest of all the cestuis que trust, that certain acts should be done by the trustees which in ordinary circumstances they would have no power to do. In a case of this kind, which may reasonably be supposed to be one not foreseen or anticipated by the author of the trust, where the trustees are embarrassed by the emergency that has arisen and the duty cast upon them to do what is best for the estate, and the consent of all the beneficiaries cannot be obtained by reason of some of them not being sui juris or in existence, then it may be right for the Court, and the Court in a proper case would have jurisdiction, to sanction on behalf of all concerned such acts on behalf of the trustees as we have above referred to. By way merely of illustration, we may take the case where a testator has declared that some property of his shall be sold at a particular time after his death, and then, owing to unforeseen change of circumstances since the testator's death, when the time for sale arrives it is found that to sell at that precise time would be ruinous to the estate, and that it is necessary or right to postpone the sale for a short time in order to effect a proper sale: in such a case the Court would have jurisdiction to authorize, and would authorize, the trustees to postpone the sale for a reasonable time.

It is a matter of common knowledge that the jurisdiction we have been referring to, which is only part of the general administrative jurisdiction of the Court, has been constantly exercised, chiefly at chambers. Of course, the jurisdiction is one to be exercised with great caution, and the Court will take care not to strain its powers. It is impossible, and no attempt ought to be made, to state or define all the circumstances under which, or the extent to which, the Court will exercise the jurisdiction; but it need scarcely be said that the Court will not be justified in sanctioning every act desired by trustees and beneficiaries merely because it may appear beneficial to the estate; and certainly the Court will not be disposed to sanction transactions of a speculative or risky character. But each case brought before the Court must be considered and dealt with according to its special circumstances. As a rule, these

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circumstances are better investigated and dealt with in chambers. Very often they involve matters of a delicate and private nature, the publication of which is not requisite on any good ground and might cause great injury to the trust estate.

With these general observations we pass to the cases now before us. The circumstances and the evidence have been considered by us. We do not think it is necessary to refer to them in detail. We need only say that they relate to a prosperous limited company whose shares are fully paid up, and to a condition of affairs that has arisen which makes it desirable, in the interests of all the shareholders, that by their consent the company should be reconstituted by the company being wound up and a new company formed to take over its assets. The new company is to be like the old company, except that the capital is larger and that the new company will have power to issue debentures. The shares in the old company will be represented by fully paid-up shares and debentures in the new company. Every shareholder who is sui juris agrees to the scheme; but some shares are held by trustees who wish the sanction of the Court to their assenting on behalf of beneficiaries who are not sui juris or not in existence, the other beneficiaries agreeing. We understand that Cozens-Hardy J. was himself satisfied that the course proposed to be adopted by the trustees was one which, if it could be, should be sanctioned by the Court. We think, under the circumstances of the case, that the Court has jurisdiction to sanction, and ought to sanction, the proposed acts of the trustees. But the evidence should be supplemented so as to make clearer the points urged in the course of the argument before us as to the importance of further capital being provided by the proposed reconstruction of the company, the issue of debentures by the new company, and the difficulties that will arise if the trustees are obliged to stand aloof and to take no part in any reconstruction. Then, in the cases where the trustees are not by the terms of the trust instrument authorized to invest in the shares or debentures of such a company as the proposed new company, they must undertake to apply to the Court for leave to further retain the shares and debentures

they will obtain under the scheme of reconstruction, if they desire to retain them beyond one year from the time the reconstruction is carried out. (1)

(1) *In re* HARGREAVES. HICK *v.* HARGREAVES.

[1886 H. 1879.]

John Hargreaves, deceased, by his will and codicils gave his residuary estate to trustees in trust for sale and conversion, with power for them to postpone such sale and conversion so long as they should think it conducive to the interests of his family. The trustees' powers of investment included debenture stocks only, and not ordinary stocks or shares, of any railway company in Great Britain. The testator at his death held ordinary stocks of the Midland Railway Company and the Lancashire and Yorkshire Railway Company to a very large amount, which were duly transferred into the names of his trustees. They also held other stocks (but not debenture stocks) in those companies which since the testator's death had been allotted in respect of the original holdings. In October, 1886, the trustees applied by summons for the directions of the Court as to whether they should retain or sell the several stocks. The application came on in chambers before Kay J., who, on October 27, 1886, made an order in the following form: "The judge recommends the applicants, the trustees of the will and codicils of the testator, John Hargreaves, to sell gradually, and under the advice of such stockbrokers or stockbroker as they may think fit to employ, the whole of the said sums of railway stock, together with any other stocks of those railways, not being debenture stocks, which have been allotted to and taken up by the trustees for the time being of the said will and codicils. But the judge being of opinion that, according to the true construction of the said will and codicils, the trustees for the time being thereof have an absolute discretion as to the time for converting into money the personal estate of the testator invested in stocks, shares, and other investments at the time of his decease, doth not think fit to interfere with such discretion by giving any directions." Costs of all parties to be taxed as between solicitor and client and to be raised and retained by the trustees out of the testator's residuary personal estate.

Solicitors: *Rowcliffes, Rawle & Co., for Fullagar & Hulton, Bolton; Tathams & Pym.*—G. I. F. C.

Solicitors: *Taylor, Hoare & Pilcher, for Parr & Butlin, Nottingham, and for Hunt & Dickins, Nottingham.*

G. I. F. C.

C. A. 1901 Aug. 2.

## *In re* HENRY, MARQUIS OF ANGLESEY. WILLMOT *v.* GARDNER.

[1899 A. 553.]

*Interest—Tradesman and Customer—Implied Agreement by Customer to pay Interest.*

During a series of years a tradesman, in the yearly accounts which he delivered to his customer, charged him with interest on amounts which had been due for three years and longer. The customer never objected to the charge for interest, and he from time to time made payments to the tradesman on account generally. At the time of the customer's death a large amount was due from him to the tradesman for goods supplied:—

*Held*, that an agreement on the part of the customer to pay interest ought to be inferred from the course of dealing, and that the tradesman was entitled to prove in the administration of the customer's estate for interest as it had been charged, as well as for principal.

Decision of Cozens-Hardy J. (which was founded on *In re Lloyd Edwards*, (1891) 61 L. J. (Ch.) 22) reversed.

Appeal against the refusal of Cozens-Hardy J. to admit a part of a claim against the estate of Henry, fourth Marquis of Anglesey, who died on October 13, 1898.

The action was brought by a creditor for the administration of the estate of the Marquis.

The defendant was his executor.

The claim was made by Messrs. Skinner & Co., tailors, for goods supplied to the testator and interest on overdue accounts. The claim was for 3318*l.* 5*s.* 3*d.*, of which 1155*l.* 16*s.* was for interest.

W. G. Skinner, a member of the firm of Skinner & Co., in his affidavit in support of the claim, said: "The question of interest charged in my firm's accounts against the testator was never disputed by him, but on the contrary it was agreed between my firm and the testator that the interest should be charged in the said accounts, and it was understood between the testator and my firm that the interest so charged would in due course be paid. The defendant J. P. Gardner, as agent to the testator, on December 24, 1896, sent to my firm a cheque

for 1000*l.*, on account of the amount owing to my firm. And at the same time he also sent the following letter: 'Herewith I send you cheque for 1000*l.* on account of amount owing to you by Lord Anglesey.' On June 25, 1898, the defendant Gardner as such agent sent to my firm another cheque for 1000*l.*, further on account of my firm's account, accompanied by the following letter: 'At Lord Anglesey's request I herewith send you cheque for 1000*l.*, on account of the amount owing to you by his lordship.' The said accounts were regularly each year sent in by my firm to the testator, and no objection was raised by or on behalf of the testator in the said letters to the interest charged by my firm, nor was any objection ever made by the testator to the said interest. I claim on behalf of my firm that, having regard to the facts above stated, my firm are entitled to be allowed and paid their claim for interest against the estate of the testator as set out in the said accounts delivered from time to time by my firm to the testator."

The following letters were also relied on in support of the claim.

A letter dated September 28, 1888, written by the testator to Skinner & Co., inclosing a cheque for 700*l.*, in the following terms: "I beg to inclose you a cheque for 700*l.*, which I hope will be of use to you."

A letter dated June 12, 1890, from the defendant Gardner, as the agent of the testator, to Skinner & Co., inclosing a cheque for 1000*l.* on behalf of the testator's account, as follows: "Inclosed I send you cheque for 1000*l.* on Lord Anglesey's account."

A letter dated February 29, 1896, from the defendant Gardner, on behalf of the testator, to Skinner & Co., as follows: "I shall be obliged if you will give me a short cash statement of your yearly accounts, and the interest you have charged. Without looking up the correspondence, I believe the late Marquis owed you about 600*l.* and that the present Marquis promised he would pay this amount, but was not asked and never promised to pay any interest. I think, however, you have charged him interest upon that sum. I shall be glad if you will let me know whether this is so."

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The reply of Skinner & Co., dated March 2, 1896, to the last letter, was as follows: "In reply to your favour of the 29th ult. we beg to hand you herewith statement of account against the Marquis of Anglesey, as requested. It will be perceived that the balance due by the late Marquis was 604*l.* 4*s.*, to which is added six years' interest at 4 per cent. only, as arranged with the present Marquis, and his lordship was good enough to favour us with a cheque on September 29, 1888, for 700*l.*, which was placed to the credit of the old account, thus shewing a balance of 49*l.* 3*s.*, that amount having been transferred to his lordship's account in accordance with instructions at Christmas, 1888."

W. G. Skinner in another affidavit deposed that the sum of 700*l.*, for which a cheque was sent by the testator with the letter of September 28, 1888, "was paid to my firm by the testator generally on account of the sums at that time due by him to my firm under the agreement referred to by me in my former affidavit." He also said that the sum of 1000*l.*, sent to his firm by the defendant Gardner on June 12, 1890, "was also a further payment on account of the sum at that time due under the said agreement for goods supplied and interest charged on the balance of the said account, the detailed particulars of such account and such interest having been regularly supplied to the testator."

The accounts sent by the claimants to the testator contained a statement that 5 per cent. interest would be charged after twelve months' credit, but in fact the claimants did not charge the testator with interest until after three years' credit.

There was no evidence, other than that above stated, of an agreement by the testator to pay interest, and there was no evidence on the part of the defendant. Cozens-Hardy J., though he was inclined to think that an agreement by the testator to pay interest might be inferred, refused to admit the claim for interest, because of the decision of Kekewich J. in *In re Lloyd Edwards.* (1)

The claimants appealed.

(1) 61 L. J. (Ch.) 22.

*Rawlins, K.C.*, and *R. J. Parker*, for the claimants. No doubt in order that interest may be claimed in such a case there must be either an express agreement by the customer to pay it, or an agreement which is to be inferred from the course of dealing: *Calton* v. *Bragg*. (1) But accounts not objected to for a number of years afford sufficient evidence of a promise to pay interest: *Bruce* v. *Hunter*. (2) Cozens-Hardy J. would have admitted the claim for interest, but for the decision of Kekewich J. in *In re Lloyd Edwards*. (3) But that was not so strong a case in favour of the claim for interest as is the present case, and, moreover, that decision is not binding on this Court. It is submitted that an agreement by the testator to pay interest ought to be inferred.

*Eve, K.C.*, and *Ashworth James*, for the executor. There is no sufficient proof of any agreement to pay interest. A lump sum was charged, without reference to any particular item, and the principal sum was never liquidated.

RIGBY L.J. I think there is evidence of an agreement by the testator to pay interest on the terms on which it was actually charged to him—that is, not immediately, but after the lapse of three years from the time when the principal sum became due. The claimants are, therefore, entitled to prove for interest on that footing.

COLLINS L.J. I am of the same opinion. It is true that this claim is made against the estate of a dead man; but in the present case I do not think that is really material, in the sense in which it generally is material in cases of this kind. There is no question here about something which the testator is alleged to have said or done as to which there is no evidence except that of the one living person who is claiming against the estate of the deceased. In the present case the evidence consists of the acts and admissions of the deceased himself. These are facts about which there is no dispute. The bills were sent in to the testator; in those bills the claim for

(1) (1812) 15 East, 223; 13 R. R. 451. (2) (1813) 3 Camp. 467.
(3) 61 L. J. (Ch.) 22.

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interest was made, and payments were made by him thereupon. All these facts are entirely beyond controversy; and, that being so, of what are they evidence? That would be a matter for a jury, and it could not be withdrawn from a jury. It seems to me that the reasonable inference from the facts is, that the deceased dealt with the claimants on the footing that he was to pay them interest after the lapse of three years.

ROMER L.J. I agree, and I have nothing to add.

Solicitors: *Maude & Tunnicliffe; Farrer & Co.*

W. L. C.

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C. A. 1900 KEKEWICH J. *July* 19. C. A. 1901 *Aug.* 2.

## HILDESHEIMER *v.* W. & F. FAULKNER, LIMITED.

[1900 H. 597.]

*Copyright—Infringement—Work of Art—Picture—Penalty—"Every such Offence"—Minimum Amount—Known Coin of the Realm—Fine Arts Copyright Act*, 1862 (25 & 26 *Vict. c.* 68), *s.* 6.

The making or circulating of every unauthorized copy of a picture of which copyright has been acquired under the Fine Arts Copyright Act, 1862, is a separate offence in respect of which a penalty is incurred under s. 6 of the Act.

*Ex parte Beal*, (1868) L. R. 3 Q. B. 387, approved and followed.

But, when an action is brought to recover penalties in respect of a number of such offences, the Court is not bound to award for each offence a penalty of at least one farthing, but may award for all the offences a lump sum, which, if divided by the number of offences, will give for each a fraction less than the least recognised coin of the realm.

*Green* v. *Irish Independent Co.*, [1899] 1 I. R. 386, disapproved.

Decision of Kekewich J. (founded on that case) reversed.

SUMMONS for the determination of the amount of the penalties to be paid by the defendants W. & F. Faulkner, Limited, for their infringement of the plaintiff's copyright in twelve pictures.

The pictures were used by the plaintiff as a stiffening for packets of cigarettes, and the copies were printed for the defendants Faulkner by the defendants Sir Joseph Causton & Sons, Limited, at a cost of 2*s.* per 1000.

The plaintiff had acquired a copyright in the pictures by registration under the Fine Arts Copyright Act, 1862.

At the trial of the action on May 22, 1900, before Kekewich J., it was ordered that the defendants W. & F. Faulkner, Limited, their servants, &c., should be perpetually restrained from selling or distributing in their packets of cigarettes prints of the pictures in question, other than prints made by the plaintiff. And an inquiry was directed how many copies of the pictures printed by the defendants Sir Joseph Causton & Sons, and delivered to the defendants W. & F. Faulkner, Limited, had, since July 8, 1899, been put in circulation by the latter defendants, and how many remained in their possession. And it was ordered that the defendants W. & F. Faulkner should deliver up to the plaintiff all of such last-mentioned copies as remained in their possession, and the plaintiff was to be at liberty, after such inquiry had been answered, to apply as to penalties and damages. And it was ordered that the defendants Sir Joseph Causton & Sons should pay to the plaintiff 2*l.* in respect of damages sustained by him in consequence of their infringement.

The master by his certificate, dated June 12, 1900, in answer to the inquiry, found that 1,012,600 copies of the pictures printed by the defendants Sir Joseph Causton & Sons, and delivered to the defendants W. & F. Faulkner, had since July 8, 1899, been put in circulation by the latter defendants, and that no copies thereof remained in their possession.

The plaintiff on June 28, 1900, issued a summons, asking "that the defendants W. & F. Faulkner, Limited, may be ordered to pay to the plaintiff such penalties and damages as, having regard to the certificate of the master, may to this Court seem fit."

The hearing of the summons was adjourned into Court, and heard before Kekewich J. on July 19, 1900.

*Warrington, Q.C.*, *C. A. Russell, Q.C.*, and *Hildesheimer*, for the plaintiff, referred to *Ex parte Beal* (1), *Ellis* v. *Marshall & Son* (2), and *Baschet* v. *London Illustrated Standard Co.* (3)

(1) L. R. 3 Q. B. 387. (2) (1895) 64 L. J. (Q.B.) 757. (3) [1900] 1 Ch. 73.

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HILDESHEIMER v. W. & F. FAULKNER, LIMITED.

*Warmington, Q.C.*, and *A. J. Walter*, for the defendants, referred to *Green* v. *Irish Independent Co.* (1)

KEKEWICH J. Two questions fall for decision. As regards the first, it was argued on behalf of the defendants that in producing these million copies they had only committed one single offence, for which there could be recovered by way of penalty a sum not exceeding 10*l.* I feel myself bound by the judgment of Blackburn J. in *Ex parte Beal* (2), in which Mellor and Lush JJ. concurred, to hold that that is not the true construction of the Act. It seems to me that, notwithstanding the way in which the question was raised, the decision was on the construction of the Act, and it is clear and is binding on me; but apart from that it seems to me clear that the construction there put upon the Act is the right one. I had the point before me in *Baschet* v. *London Illustrated Standard Co.* (3), and I then acted upon that view. "Every such offence" in s. 6 seems to me to depend upon "any repetition, copy, or imitation of the said work," and not on the word "multiply" and the words that are used in collocation with that word, and "every such offence" means every offence whereby a repetition, a copy, or an imitation is produced. I think that is the true construction of the Act, and as I read the judgment in *Ex parte Beal* (2) the question is settled by that authority.

The second question is of a different character altogether. For "every such offence," construed as I have construed it, the person who commits it shall forfeit to the proprietor of the copyright for the time being a sum not exceeding 10*l.* I do not think that the words "not exceeding 10*l.*" assist us very much. That is only a limit to prevent too much being recovered for any offence however great. The question is, What is "a sum"? It was argued that I may award a fraction of a farthing, or a fraction of a pound, or of a penny, and that it is immaterial which it is; but the object, of course, is to get the Court to give a fraction of a farthing, because, unless the sum

(1) [1899] 1 I. R. 386. (2) L. R. 3 Q. B. 387, 394.
(3) [1900] 1 Ch. 73.

is reduced to a fraction of a farthing, there will be no reduction below the large sum, over 1000*l.*, which would be payable at a farthing per copy. One can try the question just as well by a fraction of a pound as by a fraction of a farthing. Is any fraction of a pound a "sum" within the meaning of the Act? Mr. Warrington's argument as to the impossibility of recovering small fractions of a penny as penalties might not be strictly correct as regards the fraction of a pound, as 5*s.* might for convenience be described as the fourth of a pound, and there would, I presume, be no difficulty in recovering such damages if an order of that nature were made. But when we come to a fraction of a farthing, some difficulty is raised as regards recovering it, and that leads to the conclusion that the Legislature must have meant by "sum," not merely a sum which can be expressed in figures, but a sum which actually exists in reality. The question is one of some little difficulty, and I was disposed, as was FitzGibbon L.J. in *Green* v. *Irish Independent Co.* (1), to avoid a conclusion which leads to extravagance, because I cannot help thinking that to give over 1000*l.* as penalties for the production of a million of these ephemeral pictures is somewhat extravagant. I observe that FitzGibbon L.J. was very much pressed with that, because he treats it as a strong thing to do, and one which he desired to avoid doing. He says (2): "I am not satisfied that the law compels us to punish a number of offences, for each of which a farthing is far more than an adequate penalty, by awarding as many farthings as there are offences included in the aggregate of offences. The only reason for awarding a farthing is that it is the smallest coin of the realm, and if one of those coins is an adequate penalty for an aggregate of offences, I cannot see that we are forced to give more than one farthing for the lot." It is to be observed that that argument of his goes to shew that the Court is not bound to give a separate sum for each offence, but that point is concluded against his view by *Ex parte Beal.* (3) The other two Lords Justices took a different view. Walker L.J. does not seem to have considered the question for himself, but to

(1) [1899] 1 I. R. 386. (2) [1899] 1 I. R. 392.
(3) L. R. 3 Q. B. 387.

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have simply followed Charles J. in *Ellis* v. *Marshall & Son.* (1) I mean, so far as he expressed himself. He says (2): "I should have been glad if I had been able to come to the conclusion either that the newspapers were not in circumstances like the present within the scope of the Act or that the Court had control over the amount of the penalties. Not being able to do so, and thinking, like Charles J., that I have no alternative, I am of opinion that there must be judgment for the plaintiff" for the sum that he mentions. In that way he expresses his concurrence with Charles J., and he gives no further reason for his judgment. Holmes L.J. does. He says (3): "I feel bound to award at least a nominal penalty for every copy; and I know no better way of doing so than to make it a farthing for each. It seems to me that unless the penalty is measured by some coin recognised in our national system of coinage, the provision of the Legislature is disregarded." I am not sure that I should quite follow that in its fullest sense, but I do follow the argument that one must have some recognised figure, something that can be recovered, and a fraction of a farthing would not answer that description. The decision of the Irish Court is not binding upon me, but the judgment is the judgment of the Court of Appeal in Ireland, and it is entitled to the greatest respect, and I should not depart from it without the greatest consideration if it stood alone. But it does not stand alone. There is the judgment of Charles J. He does not mention, as I thought he had done, that he is giving judgment for a farthing for each copy. He gives judgment for the sum of 26*l.* 0*s.* 10*d.*; but it seems to me that he was giving judgment on that footing, and I have no doubt that that is the conclusion at which he arrived. I have, therefore, in favour of giving a farthing, the decision of Charles J., and the more recent decision in Ireland agreeing with it. The only thing against it here is that the sum mounts up to a large amount. If I could I would reduce it. I do not hesitate to say so; but, having regard to the cases to which I have referred and to the difficulty which has been pointed out of recovering a fraction of a

(1) 64 L. J. (Q.B.) 757; 11 Times L. R. 522.

(2) [1899] 1 I. R. 398.

(3) [1899] 1 I. R. 404.

farthing, if "sum" could be construed to mean a fraction of a sum, I think it my duty to say that a farthing per copy must be the limit. I cannot go beyond that, and I must leave it to a higher Court, if the case is taken there, to say whether I am wrong.

[His Lordship stayed execution pending an appeal, upon the terms of the defendants paying 200*l.* to the plaintiff and paying the rest of the money (1054*l.* 15*s.* 10*d.*) into court.]

C. C. M. D.

C. A.

The defendants appealed. The appeal was heard on August 2, 1901.

*Warmington, K.C.*, and *A. J. Walter*, for the defendants. The first question is, whether the circulation of each copy constitutes a distinct offence. Does the circulation of a million copies constitute a million offences? It is submitted that when one order is given for the printing of a number of copies there is only one offence. But on this point the decision of the Court of Queen's Bench in *Ex parte Beal* (1) is adverse to the appellants. That decision, however, does not bind this Court.

If, however, the circulation of each copy is a separate offence for which a penalty may be inflicted, it is submitted that the Court is not bound, as Kekewich J. thought, under s. 6 (2) of the Fine Arts Copyright Act, 1862, to inflict a penalty of at least one farthing for each offence, even if a farthing be (it is submitted that it is not) the smallest recognised coin of the realm. At one time a coin called a mite, said to be equal to one-sixth of a penny, was issued from the Mint. And up to the year 1854 half-farthings were coined, and were in

(1) L. R. 3 Q. B. 387.

(2) By s. 6, "If any person, not being the proprietor for the time being of copyright in any painting . . . . shall, without the consent of such proprietor, repeat, copy, colourably imitate, or otherwise multiply for sale . . . . or knowing that such repetition, copy, or other imitation has been unlawfully made, shall . . . . sell . . . . any . . . . copy . . . . of the work . . . . such person for every such offence shall forfeit to the proprietor of the copyright for the time being a sum not exceeding 10*l.*"

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circulation. Since then no coin less than a farthing has been issued by the Mint.

But, if a farthing be the smallest recognised coin, there is no reason why in a case like this the Court should not fix as the penalty a sum which would work out for each copy at a fraction of a farthing. Sect. 6 only fixes a maximum of 10*l.*; it says nothing about a minimum. No doubt one farthing is the least sum for which execution can be levied. But when the action is for a number of offences there will be only one judgment, and provided that the penalty for each offence does not exceed 10*l.*, and the total amount to be recovered is one for which execution can be levied, the Court has a discretion, and may if it pleases award a lump sum to cover all the offences. The liability of an infringer ought not to vary with the coinage for the time being. This view is no doubt inconsistent with that of the majority of the Irish Court of Appeal in *Green* v. *Irish Independent Co.* (1) But that decision is not binding on this Court, and it is submitted that the reasoning of the dissenting judge, FitzGibbon L.J., is to be preferred to that of the other members of the Court.

[They referred also to *Ellis* v. *Marshall & Son* (2); *Nicholls* v. *Parker*. (3)]

*Warrington, K.C., C. A. Russell, K.C.*, and *Hildesheimer*, for the plaintiff. By s. 8 of the Act the penalties can be recovered by summary proceeding before two justices. Sect. 6 provides that "a sum" is to be forfeited for each offence. Justices must impose a penalty for each separate offence; they could not impose a large penalty on one summons, and none at all on another.

[ROMER L.J. If there were a number of summonses, why should not the justices impose a substantial penalty on the first, and a nominal penalty—say, one-fiftieth of a farthing—on each of the others?]

The penalty must be a sum which it is possible to pay.

[ROMER L.J. If there were a million summonses for a million offences, why should not the justices make an order that a lump sum should be paid in respect of the whole?]

(1) [1899] 1 I. R. 386. (2) 64 L. J. (Q.B.) 757. (3) (1901) 17 Times L. R. 482.

Sect. 6 means that there is to be a separate penalty for each offence. "A sum" of money means something which can pass from hand to hand. A decimal ·001 of a penny could not pass from hand to hand.

[ROMER L.J. No doubt the order must be for the payment of a sum which can actually be paid in current coin. But in estimating the total sum to be paid, why need the penalty for each offence be represented by an actually known coin?]

Each offence is treated by s. 6 as a distinct thing, and here a million distinct sums have been forfeited.

[ROMER L.J. On your construction the penalty would vary according to the coinage for the time being. And the result would be that if the Court should consider that it would be just to impose a penalty of, say, 100*l.*, it would be compelled to impose a larger sum, and thus to do injustice.]

Sect. 6 assumes that there is a current coin in which the penalty imposed can be paid. In effect s. 6 provides a superior limit of 10*l.*, and an inferior limit of one farthing. An order imposing a penalty of less than a farthing would be ineffectual, for it could not be obeyed. An aggregate sum would be an aggregate of the penalties for a number of offences, and there must be a definite and appropriate sum for each offence. The Court has no power to lump the offences together for the purpose of penalty.

*Warmington, K.C.*, in reply. In this case the whole number of offences is treated as one cause of action. The rule for the construction of penal sections was stated by Lord Esher M.R. in *Tuck & Sons* v. *Priester* (1): "If there is a reasonable interpretation which will avoid the penalty in any particular case" the Court "must adopt that construction."

RIGBY L.J. It has been agreed that if we do not consider the plaintiff entitled to the amount of penalties which has been given to him by the learned judge, he is to receive 200*l.*, and therefore we are not obliged to consider what amount he ought to receive. In my opinion, the Court is not bound to give in respect of each infringement separately such a sum as

(1) (1887) 19 Q. B. D. 629, 638.

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would be recovered if the action were brought for one infringement only. The action is for breach of copyright, and the breach is practically admitted. The question is, What amount of penalties should be given to the plaintiff? In my opinion, it is not necessary to award for each offence that which would be the proper sum if there were only one offence. It is enough to say that we accept the agreed sum of 200*l.* as sufficient, and that we do not feel bound to go through the operation of summing up all the amounts which would be awarded if a separate action were brought for each offence.

COLLINS L.J. I am of the same opinion. The appellants have no doubt technically brought themselves within s. 6 of the Fine Arts Copyright Act, 1862, and they have become liable, as is now admitted, to a million penalties in respect of the distribution of a million copies of the pictures the copyright of which belongs to the plaintiff. It being admitted, subject to what I will say presently, that there have been a million offences, and that one million penalties must be imposed, the question is, at what rate per copy ought the penalty to be imposed.

Now, the words of s. 6 are these: "Such person for every such offence shall forfeit to the proprietor of the copyright for the time being a sum not exceeding 10*l.*" That obviously leaves a discretion to the Court to award a sum between 10*l.* and something else. It is said for the plaintiff that that something must be "a sum," and that nothing is a sum which is not represented by a coin of the realm. It is, therefore, contended, and the learned judge felt obliged to give effect to that argument, that in respect of each of these million copies he was bound to assess the penalty at not less than a farthing, the aggregate of the million penalties thus amounting to more than 1000*l.* On the merits of the case he thought that, if he had felt at liberty to give effect to his own view, the total penalty, i.e., the aggregate of all the million penalties, ought not to be more than 200*l.*, that is, that the penalty for each copy should not be more than a millionth part of 200*l.* What fraction of a pound that would be I do not stop to calculate. But the

learned judge felt bound by authority to assess the penalty at not less than a farthing per copy.

Is there, then, anything in the statute which obliges us to do that which the learned judge himself considered, as it certainly seems to me, a great injustice, namely, to mulct a man in over 1000*l.* when he ought in justice to be mulcted in not more than 200*l.*? Unless the statute obliges us to do this, we should not be justified in doing it. And we have the authority of Lord Esher in *Tuck & Sons* v. *Priester* (1) to the effect that if there are two possible constructions of a penal clause in a statute, one which would mitigate and the other which would aggravate the penalty, we ought to adopt that which will impose the smaller sum.

Why are we bound to say that by the word "sum" the Legislature necessarily intended a sum which is represented by a coin? They have not said so, and I cannot see any ground in reason or in principle for saying that the word must have that meaning. In the present case the action was brought in respect of the distribution, not of one copy of a picture, but of a million. One judgment was sought, and one sum was recovered, though that sum, no doubt, was necessarily arrived at by assessing a certain sum as the penalty for each offence. But there was no question of levying more than one sum, and there was, therefore, no necessity in giving effect to the decision to assign to each particular offence such a sum as, if that offence had been the only one, could have been the subject-matter of an execution.

It was pointed out by FitzGibbon L.J. in his dissentient judgment in *Green* v. *Irish Independent Co.* (2) that the only reason why a farthing is generally adopted as the lowest measure of recoverable damages in this country is that a farthing is the lowest sum for which execution can issue, it being, I believe, at the present time the smallest sum which is actually coined. But when there is no need to issue execution for that particular sum, where is the necessity that the sum assessed as the proper penalty should be represented by a coin? It seems to me that when, as here, execution is not

(1) 19 Q. B. D. 638. (2) [1899] 1 I. R. 386.

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contemplated for the particular penalty, there is no reason in principle or common sense why the penalty should not be measured as it ought to be, namely, by relation to the offence and not by reference to the possibility of levying execution, which is the only justification for giving a larger sum than justice would require. In the present case the only execution sought by the proceedings, or which could be had under the proceedings, would be for the aggregate sum for which one judgment is given. Is there anything in law to preclude us from saying that the proper penalty in the present case for each offence is that which the judge thinks just, namely, a millionth part of the aggregate sum of 200*l.*? I ought not, perhaps, to say a millionth part of the aggregate sum; I should rather say that the aggregate amount is the sum of the fractional parts of a pound, one of which is imposed for each offence. It seems to me that in this way justice will be done; and when I examine the statute I can see nothing in it to prevent us from giving effect to it.

This question has been recently discussed in the Court of Appeal in Ireland, and though their decision does not bind us, I need hardly say that we have the greatest possible respect for it. In that case FitzGibbon L.J. dissented from the judgment of the majority of the Court: he adopted the view which I am now taking; but the other members of the Court gave effect to the view which has been taken by Kekewich J. For the reasons which I have already given, I prefer the reasoning of FitzGibbon L.J.

Mr. Warmington suggested, but he did not press the point, that here only one offence has been committed, and only one penalty incurred. So to hold now would involve the overruling of the decision of the Court of Queen's Bench, in which Blackburn J. was then presiding, in *Ex parte Beal*. (1) That decision was given many years ago; it is, I think, based on good sense, and it is practically impossible to overrule it now, it having been followed in other cases, reported and unreported.

In addition to the Irish case, a decision of Charles J. and

(1) L. R. 3 Q. B. 387.

a decision of Wright J. have been cited to us, in each of which cases the penalties were assessed at a farthing per copy. But the point now discussed before us does not appear to have been taken in either of those cases, nor was it, having regard to the aggregate number of offences, necessary to raise it. At all events, it was certainly not discussed then. But, now that it has been discussed, I am of opinion that the reasons given by FitzGibbon L.J. are those which we ought to adopt. I can see nothing in the terms of the statute or in common sense which prevents our taking the view, which I do take, that we are not limited by the coinage of the realm as regards a minimum penalty. We are not dependent on the fluctuating standard of the coinage as to the sum which we must assess; we are bound to exercise our discretion in giving that which we think right in the particular case. Why should we be fettered by the arbitrary standard which from time to time may regulate the coinage of the country? I can see no reason for it. In my opinion the judgment of Kekewich J. ought to be reversed. He felt himself bound by authority, and in that I think he was right. He did not really give expression to his own view, but he felt bound by the authority of the Irish Court of Appeal, as well as by the decisions of other judges of first instance, and in reversing his decision we are in fact giving effect to his own view.

ROMER L.J. I agree. I should have been sorry had we felt bound to affirm the decision of Kekewich J., especially as we should have been doing that which the learned judge himself, had he not felt himself fettered by authority, would have wished not to do. If the plaintiff was right in his contention the Act would certainly lead to very great and unnecessary hardships, for in a case in which the number of infringements was extremely large the Court might feel itself bound to award for penalties a sum which would be obviously far beyond what in justice ought to be awarded. That, indeed, would be the result in the present case. The judgment of the Court below has in effect done that which I think the Act, according to its wording, has carefully refrained from doing. For though the

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Act expressly limits the maximum amount of each penalty, it seems to me to have taken great pains not to specify a minimum. And, moreover, the construction put upon the Act in the Court below would lead to this curious result—that the minimum penalty to be awarded would fluctuate with the coinage of the country for the time being.

These reasons, I think, shew that unless we are bound to do so we ought not to adopt the plaintiff's construction of the Act. And in my opinion we are not bound so to construe the Act.

In two respects I agree with the arguments on behalf of the plaintiff. I think that in the Act in question the Legislature did, in favour of the owner of the copyright, regard each infringing copy as constituting a separate offence. I also agree that any judgment of the Court awarding a sum of money to be paid to a plaintiff by way of penalty ought to be for a sum of money which is recognisable in this country, and which would be the proper subject of an execution. But, going so far with the plaintiff, why are we bound to give a sum beyond what we think just in a case like the present, in which the action is brought for penalties in respect of a number of infringements? So long as the judgment is for a sum in respect of which execution can issue, is there anything which compels the Court in fixing the total amount of the penalties to take care that that amount divided by the number of the offences will give to each offence a recognisable coin or coins, and in no case less than a farthing? I cannot see anything in the Act which compels us so to hold. It should be observed that the Act does not speak of any minimum limit to the amount of the penalty, nor does it speak of any coin to be awarded. It simply says, "a sum not exceeding 10*l.* in respect of each offence." I see no reason why, for the purpose of the judgment in a case in which there have been several infringements, the sum to be awarded as a penalty in respect of each offence should not be merely a fraction of some recognised coin of the country. For example, in an action for thirteen infringements, would a judgment for 100*l.* be on the face of it bad? I think not. Nor do I think a judgment for 24 pence in respect

of one hundred offences would be on the face of it bad, if the Court on consideration of the circumstances came to the conclusion that that sum distributed amongst the one hundred offences would give the proper amount to be awarded in respect of each offence. It is said that the Court has no power to do this, because where there are a million offences you must treat the case as if there were a million actions brought, one in respect of each offence. I decline so to consider this action, and it is not necessary to do so. It is said that the plaintiff might have brought a million actions, or have taken a million proceedings. I cannot admit that. But, even if he did so, it by no means follows that the Court would be bound to give a million separate judgments in those actions. There are means by which this Court could prevent such an abuse of its process. So long as the judgment is in right form, as it is in the present case, I can see nothing in the Act which prevents us from awarding a proper aggregate sum in respect of several offences, even though the amount awarded when distributed among the offences might not give a recognised coin, but only a fraction of a recognised coin, in respect of each offence.

For these reasons I agree that the appeal should be allowed. I ought to add that I am not even satisfied (though my judgment is not based on that) that a farthing is the least coin now recognised in this country.

Solicitors: *Rehders & Higgs; Cartwright & Cunningham.*

W. L. C.

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## RICHARDS *v.* DE WINTON.

[1900 R. 1273.]

## RICHARDS *v.* EVANS.

[1900 R. 1388.]

*Common Lands—Lands taken for Public Undertaking—Compensation for Extinguishment of Commonable Rights—Apportionment—Action to determine the Persons interested—Jurisdiction—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 102–104—*Inclosure Act*, 1854 (17 & 18 *Vict. c.* 97), *ss.* 15–17.

Under the Lands Clauses Consolidation Act, 1845, and the Inclosure Act, 1854, where common lands are taken for a public undertaking, the committee of commoners appointed to receive the compensation money payable in respect of the extinguishment of commonable rights, or, in cases of difficulty, the Board of Agriculture, as the successors of the Inclosure Commissioners, are the proper tribunal to determine who are the persons interested in such money, and what are their interests, and (in the absence of misconduct) the Court has no original power to interfere with the jurisdiction of either body.

An action against a committee of commoners by a person who claimed to be entitled as sole commoner to the whole of the compensation money in their hands dismissed for want of jurisdiction.

THE plaintiff by his statement of claim alleged that he was the sole person entitled to commonable rights over certain portions of Torglas Common and Neuadd Fach Common taken by the Merthyr Tydvil Urban District Council under the powers of the Merthyr Tydvil District Council Waterworks Act, 1895, for the purpose of constructing certain waterworks; that by two agreements of May 18, 1895, entered into between the council and D. T. Jeffreys, as agent for the respective commoners of the two parishes in which the commons were situated, the council agreed to pay 40*l.* per acre for the extinction of the commonable rights over any common lands within the said parishes required for the waterworks; that in accordance with the provisions of the Lands Clauses Consolidation Act, 1845, meetings of the commoners of the said respective parishes were

duly convened and held on August 2, 1895, and that the defendants were appointed committees of the commoners of the said respective parishes; that the committees had ratified the two agreements of May 18, 1895; and that they had in their hands sums amounting to about 3000*l.*, representing moneys paid by the council for the extinction of the commonable rights over the parts of the two commons taken by them for the purposes of their waterworks. The plaintiff claimed a declaration that he was entitled to those sums. The defendants by their defence raised the objection, or were treated as having raised the objection, that the Court had no jurisdiction to entertain the action.

The question turned primarily upon the construction of ss. 102–104 of the Lands Clauses Consolidation Act, 1845, and ss. 15–17 of the Inclosure Act, 1854.

The Merthyr Tydvil District Council Waterworks Act, 1895, incorporated the Lands Clauses Acts, and it also extended the application of s. 2 of the Commonable Rights Compensation Act, 1882, which provides for the application of the compensation money in certain improvements, if the commoners so desire, by enlarging the list of improvements as regards the two commons in question.

The question of jurisdiction was tried first.

*Warrington, K.C.*, and *R. Rowlands*, for the plaintiff. Where common lands are taken for public purposes, s. 102 of the Lands Clauses Consolidation Act, 1845, authorizes the promoters of the undertaking to convene a meeting "of the parties entitled to commonable or other rights over or in such lands" for the purpose of appointing a committee to treat with the promoters for the compensation to be paid for the extinction of those rights; s. 103 authorizes the meeting so called to appoint a committee "of the parties entitled to any such rights"; and s. 104 authorizes the committee to enter into an agreement with the promoters as to the amount of compensation, and to receive the compensation, and directs them to apportion it "amongst the several persons interested therein according to their respective interests." Under that Act it is settled that

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the Court has jurisdiction to decide who are the persons interested, and what are their interests: *Fox* v. *Amhurst*. (1)

[KEKEWICH J. referred to *Nash* v. *Coombs*. (2)]

Then the Inclosure Act, 1854, by s. 15 provides that, if the majority of the committee shall be of opinion that the provisions of the Act of 1845 for apportionment cannot be satisfactorily carried into effect, they may apply to the Inclosure Commissioners (now the Board of Agriculture) to call a meeting "of the persons interested" in the compensation money to determine whether the money shall be apportioned under the latter Act. Sect. 16 provides that, if "the majority in number and interest" resolve that the money shall be apportioned, it shall be paid into the Bank of England. Sect. 17 provides that as soon as the money is so paid in, the Inclosure Commissioners, or an assistant commissioner, shall ascertain the interests of the parties. But this Act cannot come into operation until a meeting has been called, and a committee appointed under the Act of 1845 "of the parties entitled to commonable rights," nor until a meeting has been called by the Commissioners "of the persons interested" in the compensation money, and "a majority in number and interest" have resolved that the money shall be apportioned. It has been shewn that under the Act of 1845 it is for the Court to decide who are the parties interested; similarly under this Act we say it is for the Court to decide who constitute the majority in number and interest at the meeting called by the Commissioners. Until that question is settled by the Court, the jurisdiction of the Commissioners under s. 17 does not arise.

Then the Commonable Rights Compensation Act, 1882, by s. 2 provides for the application of the compensation money in improvements in certain cases, and the special Act of 1895 enlarges the list of improvements authorized by the Act of 1882 as regards the commons now in question; but those Acts do not carry the matter any further. None of these Acts can be called into operation at this stage of the proceedings so as to oust the jurisdiction of the Court.

*S. T. Evans, K.C.*, and *R. J. Parker*, for the defendants.

(1) (1875) L. R. 20 Eq. 403. (2) (1868) L. R. 6 Eq. 51.

The plaintiff by his statement of claim has admitted the validity of the meetings. His case is that the committees were duly appointed at duly convened meetings; otherwise they would not be entitled to receive the compensation money. He cannot now be heard to say that he is the only commoner, because he has recognised the proceedings of the committees of commoners. But, further, the Act of 1845 contains a code for ascertaining the compensation to be paid in respect of the extinction of commonable rights and for the apportionment of that compensation. That code was found to be insufficient, and consequently the Inclosure Act, 1852, s. 22, was passed; but it is unnecessary to consider that Act, because the provisions of s. 22 were virtually re-enacted by s. 15 of the Act of 1854. The effect of the two Acts of 1845 and 1854 is this—that in simple cases it is for the committee of commoners to decide how the money shall be apportioned; but, inasmuch as the committee are not lawyers, the Legislature has provided that in cases of difficulty they may call in the Inclosure Commissioners, who are expressly authorized to determine who are the parties entitled and what are their interests, and their decision is to be final. Then the Act of 1882 provides for the application of the compensation money to public purposes, and those purposes are enlarged by the local Act of 1895. That is the procedure adopted by the Acts, and that is the procedure which must be adopted here. When the Legislature speaks of a meeting of the persons interested in the compensation money, it can only mean primâ facie interested, just as under the Bankruptcy Acts where a creditors' meeting is called that does not involve that all the claims are established. Further, this action would not affect the jurisdiction of the Commissioners under the Act of 1854, and if it were tried out it might lead to inconvenient results. We therefore submit that this action is not maintainable.

*Warrington, K.C.*, in reply. The defendants have raised two pleas—(1.) a plea to the jurisdiction; (2.) a plea that the plaintiff cannot be entitled on his statement of claim. With regard to the plea to the jurisdiction, every contingency must be looked at, and it is possible that this compensation money might be applied in improvements under the Act of 1882. That Act

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(s. 2) provides that the Commissioners may call a meeting of the persons interested to consider the question, and that at such meeting "the majority in number and the majority in respect of interest" may resolve that the money shall be applied in one or more of the improvements there mentioned; but the Act contains no machinery for determining who are the persons qualified to vote at the meeting, and, upon the defendants' view, it might turn out that the persons who voted for this application of the money were not really a majority in respect of interest. That is a fatal objection to the contention that these Acts were intended to supersede the jurisdiction of the Court. With regard to the second plea, at the time when the committees were appointed it was assumed that the persons comprising the committees were persons interested, and the Court ought not to hold that the plaintiff is estopped on this ground from maintaining this action.

KEKEWICH J. Notwithstanding the difficulty and novelty of the question falling for decision, I do not think I shall gain anything by deferring judgment.

What is the question? Mr. Warrington in reply has pointed out, and he says it is the weakest part of his opponents' case, that there is no machinery for determining who are the proper persons to say whether or not this money shall be laid out in some of the improvement purposes which are sanctioned by the general and the special Acts of Parliament. It is a singular omission, and what it would be right to do, if the question were now before me whether the money should be laid out in that manner or not, I need not pause to determine. That is not the question which I have to consider.

The plaintiff claims as his the whole of the money in the hands of the defendants, who are the committee or committees appointed under the provisions of the Lands Clauses Consolidation Act, 1845. For simplicity's sake I will speak of them as the committee, because, although there are two, for the purposes of the present action they both stand in exactly the same position. At present the plaintiff claims, not that the money should be laid out in improvement purposes, but that it

should be paid to him because he is the sole commoner. It is a strange phrase, but still that is his position. The committee, on the other hand, say that they are prepared to do their duty. They do not say that he is not the sole commoner, but that it is for them to determine whether he is or not. They say, further, that if it becomes a question which they cannot properly determine, then the Legislature provides machinery by which that will be determined by a competent tribunal. The question is whether I ought to intervene—in fact, whether I have any power to intervene—between the plaintiff and the committee, and say that the committee are not to do their duty and fulfil the obligations cast upon them by the Acts of Parliament.

What are those obligations? To use Lord Cairns' phrase in the House of Lords, the fasciculus of clauses under the head of common lands runs from s. 99 to s. 107 of the Lands Clauses Consolidation Act, 1845; but with the exception of one provision, which I will refer to presently, it is not necessary to go through these sections in detail. The Act contemplates that in the course of taking lands for the purposes of railways and other public works the promoters of the undertaking, as they are called, would have to buy up common rights, and those who have had any experience in such matters know that the Legislature was well advised in providing for such a state of facts, because it has frequently occurred, and must occur again and again so long as compulsory powers are vested in public bodies. There being no trustees, no tenant for life, and still less any tenant in fee, who could make a bargain, it was necessary that something should be done to ascertain what money should be paid for the acquisition of common rights. Accordingly, the Legislature provided that a meeting should be summoned of those who claimed to be interested, and they were to determine what should be done. They were to appoint a committee, and the committee were authorized to make a bargain binding upon the commoners and to receive the money. It was not at all difficult machinery, but was fairly straightforward. No doubt it was contemplated that it would work well, because in most cases there is not any serious doubt

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who the commoners are. Then, the committee having been appointed, and having made their bargain with the railway company or other promoters of the undertaking, of course the money which they received had to be distributed among those whom the committee represented, and the 104th section provides thus: "And such compensation, when received, shall be apportioned by the committee among the several persons interested therein, according to their respective interests." Under that provision, it seems to me, they were bound to ascertain who were the persons interested and what were the particular interests of the several commoners, who might have varying rights, and then to distribute the compensation money among those parties according to their respective interests. The Legislature does not seem to have anticipated that any difficulties would arise, and, as a matter of fact, I believe that it is only now and again that difficulties have arisen. What would happen under that Act if difficulties arose it is hard to say.

The case to which I called attention in the course of the argument of *Nash* v. *Coombs* (1) shews that it would be open to the committee to come to the Court for directions in order to ascertain what they should do with the money which was intrusted to their care, and no doubt some means would be found to make them do their duty if they did not shew proper alacrity in performing it. But I do not see how the Court could have determined, even under that section, who were "the several persons interested therein" if it was objected that there was no jurisdiction. I put the case of a committee threatening and intending to exclude some person who claimed to have an interest, and suggested the question whether he could maintain an action for an injunction to prevent their distributing the money without making proper provision for him. As at present advised, I think that, if any such action were brought and it were resisted, it would fail on the ground that it was not competent for the Court to interfere. Of course, I am not thinking of a case of fraud, or of the committee improperly refusing to hear and determine a claim, or anything of that kind. For every-

(1) L. R. 6 Eq. 51.

thing that was wrong in that sense, no doubt, the Court would find a remedy. But the duty seems to me to be cast on the committee to apportion the money among the several persons interested therein according to their respective interests, and though it is impossible to say it is a new right by reason of the substitution of the right to money for the right of common, still it is, in one sense, a new right created by statute with machinery for ascertaining the extent and limits of the right, and to such a case as that it is difficult to apply the common law, and to say that the Court has jurisdiction when the particular procedure or remedy has been given by statute. So the matter seems to me to stand under the Lands Clauses Consolidation Act, 1845.

The next statute is the Inclosure Act, 1852 (15 & 16 Vict. c. 79). I need not dwell upon that. Mr. Evans has properly called my attention to it, because in construing these Acts it is desirable to have them all under one's eye and to compare them. There is a difference in that Act from the Act of 1854, to which I shall next refer, but I do not think it is important for the purposes of my judgment.

Then comes the Inclosure Act, 1854, and we must remember that it really is an Act for amending the Lands Clauses Consolidation Act, 1845, as regards the fasciculus of clauses to which I have called attention, and no other. The Act (s. 15) presupposes that the common rights have been taken by the promoters of the undertaking—the railway company or other body—and that the bargain is complete. The Act does not substitute any new provisions for determining how the bargain is to be made. It supposes that the meeting has been called, that the committee have been appointed, and have met the promoters of the undertaking, and that a bargain has been struck, and the money received by the committee. So far the provisions of the Lands Clauses Act are not touched. But then it seems to have occurred to the Legislature that there might be a difficulty in carrying out that apportionment with which I was just now dealing directed by the 104th section of the Lands Clauses Consolidation Act. The phrase is peculiar. It says: "Where the majority of such committee shall be of

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opinion that the provisions of such Act"—that is, the Lands Clauses Consolidation Act—"for the apportionment thereof" —that is, the money—"cannot be satisfactorily carried into effect," and so on. I was somewhat puzzled at first to know what was the meaning of "cannot be satisfactorily carried into effect." I think it means no more than this: "If difficulties occur in the apportionment which the committee do not see their way to solve." Then, what are they to do? They are to make an application in writing to the Commissioners—that is, the Inclosure Commissioners, now the Board of Agriculture—to call a meeting of the persons interested in the compensation money. They are to apply to the Commissioners to call a meeting, and then the Commissioners are to call a meeting if they please. The Act of 1852 distinctly recognised their right to say Yes or No. There is nothing to interfere with that in this Act, and if the Commissioners neglected to call the meeting—that is to say, did not accede to the application—there might be a difficulty; but that stage has not yet been reached, and, as any hesitation on the part of the Commissioners or the Board of Agriculture cannot be reasonably anticipated, I think I may pass that by as one of those contingencies with which I am not now called upon to deal. Then the meeting that they are to call is to determine whether or not such compensation money shall be apportioned under the provisions of this Act.

Now, up to this time I have failed to find any means of disposing of the money except by apportionment. The provisions which were much discussed, and to which I referred just now, with regard to applying this money in public improvements, had not then seen daylight. They had not occurred to any one till then, at any rate they had not been sanctioned by the Legislature, and the only thing to do, so far as I can see, was either to leave the money where it was, which can hardly be supposed to be right, or to apportion it amongst the persons interested as directed by the 104th section of the Lands Clauses Act. Therefore, I am sorry to say that I do not exactly see what was the point of the meeting being called "to determine whether or not such compensation shall be apportioned under the provisions of this Act." My diffi-

culty in seeing what was in contemplation by the Legislature is increased by this, that there is no provision here for the event—extremely unlikely, no doubt, but still a possible event—of the meeting determining that the compensation money shall not be apportioned. In that event, nothing happens at all; and what would really be done in that deadlock I am not, fortunately, called upon to say, and I do not propose to attempt an opinion.

The rest of the Act proceeds on the footing, which, no doubt, is the reasonable and likely one, that the meeting has been called by the Commissioners and that it will determine that the money shall be apportioned. From that we start. It is, of course, open to the plaintiff to say that we have not arrived at that. There has been no application to the Board of Agriculture. They have not called a meeting, and the meeting, therefore, has not determined whether the compensation money shall be apportioned, and consequently, it may be said, it is useless to consider what is to happen when that has been done. I think the answer to that is this—that if, unfortunately, the deadlock which I pointed out occurs, the Court must decide for itself whether there is any solution within the power of the Court. It has not occurred, and I must deal with the matters as they stand, giving credit to the committee for a desire to do their duty, as they say they are prepared to do, and, of course, giving credit to the Board of Agriculture to use the discretion vested in them properly for the benefit of all concerned. I must assume, as the Act does, for the present purpose that the meeting will be called and will determine that the money shall be apportioned. Then what is to happen? The money will be paid into the bank so that it shall be under the control of the Board of Agriculture.

Then the 17th section contains the procedure, which seems to me to present no difficulty at all once you have arrived at that stage. The Board of Agriculture directs an inquiry, appoints an assistant commissioner for the purpose, and through him must "proceed to ascertain, determine, and award" (I think the word "award" is not to be passed over) "the names of the parties who were entitled to such

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estates, rights, and interests in the said common and commonable lands, and the amount or value of their respective shares, rights, and interests therein, and the proportionate amount of the price so to be paid as aforesaid for such estates, rights, and interests to which each party so entitled as aforesaid is entitled, in respect of his share, right, or interest as aforesaid," and that is to be binding on the parties interested. When once you get to that stage it seems quite impossible for the High Court or any other Court to intervene, except, perhaps, on the invitation of the Board of Agriculture. I do not say they might not have the assistance of the Court if they wished, but it is left entirely to them to determine the rights of the parties. As I have already said, it does not seem to me to be an objection to relying on those provisions that the Board of Agriculture have not yet been called in and cannot yet be called in because the preliminary steps have not been taken. Here we have a still stronger provision than in the Lands Clauses Consolidation Act. In that Act we have only the provision, which I will not read again, directing the committee to apportion the money. Here we have not only a direction to the Board of Agriculture to do it, but a carefully considered procedure with their duties and powers expressed in very plain as well as elaborate language. With that, it seems to me, I have no right to interfere. Again, the plaintiff must come under these Acts (and I think that is the real point of Mr. Parker's argument), as against the committee, to claim money which was received by the committee under the procedure appointed by the Acts; and, claiming under the Acts, he must claim in the manner pointed out by the Acts and through the tribunal appointed by the Acts.

That being my opinion on those Acts, I need only give a passing word to the Commonable Rights Compensation Act, 1882 (45 & 46 Vict. c. 15), and to the special Act of Parliament under which the Merthyr Tydvil District Council took this land. It had not been thought of before that there was or might be a way of applying the money to be paid for commonable rights which would be equally beneficial to the commoners as dividing it between them in portions which in some cases would be extremely small, and so this Act of 1882 provides

that the money may be laid out in certain improvement purposes, and the special Act, which incorporates the Lands Clauses Consolidation Act, 1845, and those other Acts that have enlarged the powers conferred by that Act, enacts that the improvements which are mentioned in the Act of 1882 shall include also some others which are mentioned specifically therein. That does not affect the apportionment. One is bound to look at those Acts, of course, to see the whole scheme of legislation, but I have not to construe the Act of 1882. I have only to see how far it assists me in determining what is the meaning of the previous Acts. If I had to construe it, then, no doubt, Mr. Warrington's objection would apply that there is no machinery to determine who is to say whether the money shall be laid out in improvements or not, or in which particular improvement. My answer to that is that at present I have nothing to do with that. The committee being willing to discharge the duties cast upon them by Parliament, and there being not the slightest suggestion that they do not intend to discharge those duties honestly and to the best of their ability, or that, if there should arise any difficulties which they cannot see their way to solve, they will not have recourse to the very easy means which Parliament has pointed out to them, I think my duty is to say that I cannot interfere with them in the present circumstances. The action must be dismissed.

Solicitors: *Schultz & Son, for Gwilym James, Charles & Davies, Merthyr Tydvil; Sharpe, Parker, Pritchards, Barham & Lawford, for D. T. Jeffreys, Brecon.*

H. B. H.

KEKEWICH J.

1901

*Aug.* 1.

## *In re* WOOD.
## WOOD *v.* WOOD.

[1901 W. 1782.]

*Will—Construction—Illegitimate Children—Gift to Children Nominatim—Gift to Next of Kin of Children.*

A testator gave a legacy to each of his seven children by name, and directed that after the death of his wife his residuary estate should be held upon trust for such of his seven children thereinbefore named as should be then living and should attain twenty-one; and he directed his trustees to retain the legacy and the share of residue which any daughter might take under the will, and to hold the same upon trust to pay the income to the daughter for life, and then to her husband for life if she should so appoint, and subject thereto in trust for her children, and in default of children in trust for the persons who at the death of such daughter would have been entitled to such share under the Statutes of Distribution in case she had died possessed thereof without having been married. It was ascertained from the testator's widow that three of the children were borne by her to the testator before her marriage:—

*Held*, that the share of an illegitimate daughter who died without having exercised her power of appointment in favour of her husband and without having had any issue did not pass to those who would have been her next of kin if she had been legitimate, but passed to her legal personal representative as if it had been absolutely bequeathed to her.

*In re Standley's Estate*, (1868) L. R. 5 Eq. 303, followed.

Dictum of Stirling J. in *In re Deakin*, [1894] 3 Ch. 565, 573, not followed.

THE testator by his will, dated May 12, 1883, bequeathed a pecuniary legacy to each of his seven children by name, and he directed his trustees to stand possessed of his residuary estate after the death of his wife in trust in equal shares for such of his seven children thereinbefore named as should be then living and should have attained or should attain the age of twenty-one years. And the testator directed his trustees to retain the legacy and the share of his residuary trust estate which any daughter of his might take under the provisions thereinbefore contained, and to hold the same upon trust to pay the income of each such daughter's legacy and share to her during her life for her separate use, and from and after her death, in case she

should leave a husband surviving her, upon trust to pay the income to the husband for life or any less period if she should so direct or appoint, and subject thereto in trust for her children as therein mentioned; and the will continued as follows: "And if there shall be no such child, then in trust for the persons who at the death of such daughter would have become entitled to such share under the statutes for the distribution of the personal estates of intestates in case she had died possessed thereof without having been married, such persons taking as tenants in common in the shares in which they would have taken under such statutes."

The testator died in December, 1883.

Shortly after the testator's death it was ascertained from his widow that three of the testator's children were born before her marriage to him. The testator's widow died in December, 1900, leaving six of the seven children her surviving. The testator's daughter Rosalind, who was one of the three illegitimate children, died in January, 1901, leaving a husband surviving her, but without having had any issue. She never in any way exercised the power of appointment in favour of her husband given to her by the will. This summons was taken out by the youngest child of the testator to determine whether the legacy and share of residue bequeathed by the testator for the benefit of his said daughter devolved, upon her death without issue, upon the persons who would have been her next of kin at the time of her death in case she and the other persons described in the will as the testator's children had all been legitimate, or passed to her legal personal representative as if the same had been absolutely bequeathed to her, or became divisible amongst the persons entitled in right of the testator's widow and legitimate children as if he had died intestate in relation thereto. The question as to the admission of the blood relations of the illegitimate children was first argued.

*Warrington, K.C.*, and *Lyttelton Chubb*, for the plaintiff. Under this will the gift to the persons entitled under the Statute of Distributions includes the blood relations of the illegitimate children. This case falls within both the principles

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enunciated by Lord Cairns in *Hill* v. *Crook*. (1) He there laid it down that there are two classes of cases in which the primary signification of the word "children" will be departed from— (1.) where it is impossible from the circumstances of the parties that any legitimate children can take under the bequest; (2.) where the testator has used the word "children" in an artificial sense, and his will is taken as a dictionary to ascertain the meaning of the terms there employed. Here the gift to the next of kin, the daughter having died without issue, can have no effect unless it includes blood relations, and the testator has shewn by the language of the will that he uses the term "children" as including illegitimate children. The language of Lord Cairns shews that the rule of interpretation laid down by him is not confined to the children of the testator, but embraces the correlative terms applicable to the various degrees of relationship between the children. *In re Deakin* (2) is also in point. There the testator gave his residuary estate to his wife's relations. The wife was born out of wedlock and was childless. Consequently the gift could have no effect unless it denoted natural relations. Stirling J. held that the natural relations were included. That was a stronger case than this, because in that case there were no expressions in the will to assist the construction. The learned judge disagreed with the decision of Wood V.-C. in *In re Standley's Estate* (3), which he said was indistinguishable from the case before him, on the ground that it was inconsistent with *Hill* v. *Crook*. (4) If the Vice-Chancellor had been instructed by *Hill* v. *Crook* (4) he would have seen that the earlier cases which he followed were irreconcilable with the doctrine laid down by Lord Cairns.

[They also referred to *In re Haseldine*. (5)]

*P. O. Lawrence, K.C.*, and *A. F. Peterson*, for the legal personal representative, and

*Renshaw, K.C.*, and *Frederic Thompson*, for the persons entitled on an intestacy, were not called upon.

(1) (1873) L. R. 6 H. L. 265, 282, 283, 285.
(2) [1894] 3 Ch. 565, 573.
(3) L. R. 5 Eq. 303.
(4) L. R. 6 H. L. 265.
(5) (1886) 31 Ch. D. 511.

KEKEWICH J. I shall best perform my duty by rejecting Mr. Warrington's contention. No one can doubt that the severe rules which obtained in the younger days of some of us, and which were handed down from the time of Lord Eldon, have been modified benevolently in later years. *Hill* v. *Crook* (1) is an example of that, and the more recent case of *In re Haseldine* (2), which has just been mentioned, was a strong case of extracting from the language used by the testator an intention to include illegitimate children under phrases and terms which otherwise would be strictly construed as children in the ordinary sense of children ex justis nuptiis procreati. The other case to which I have been referred is that of *In re Deakin* (3); and I have myself not hesitated to adopt the same line of reasoning in the case of *In re Parker* (4), which I think stands alone as including in a class of wife's nephews and nieces an illegitimate nephew of the wife's. Here I am asked to go further, and say that the testator's reputed children are to be regarded as legitimate for the purpose of benefiting those who are not in law their next of kin, but who would have been under the Statutes of Distribution their next of kin if the children had been legitimate. That is another step in favour of the benevolent view of letting in illegitimate children where the Court sees that that is the testator's intention. It is a distinct step, and I think it is a step which ought not to be taken by a judge of first instance, but ought to be taken, if at all, by the Court of Appeal or the House of Lords. Mr. Warrington was unable to cite any case in which this has been done, and the very point came before Wood V.-C. in *In re Standley's Estate* (5), and he declined to extend the law in that way. There the words of the gift were to the son's "next of kin under the statute for the distribution of intestate's estates in case he had died unmarried and intestate," and the result was that only those who were next of kin in blood could take under the gift, if any one was to take at all. Wood V.-C., who I need hardly say is a very high authority,

KEKEWICH J. 1901 WOOD, *In re.* WOOD *v.* WOOD.

(1) L. R. 6 H. L. 265.
(2) 31 Ch. D. 511.
(3) [1894] 3 Ch. 565, 573.
(4) [1897] 2 Ch. 208.
(5) L. R. 5 Eq. 303.

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declined to give effect to the gift. He said (1): "The only cases in which effect has been given to a limitation in favour of illegitimate children (who, in the eye of the law, are no children at all), are cases where it can be distinctly ascertained that the testator pointed out those children as personæ designatæ, although he did not name them. For example, where a testator speaks of 'the children of my deceased brother,' and the brother never was married; in that case there could be none but illegitimate children; but as he speaks of the children as living, it is the same thing as if he had written the names of each of them in the will." I do not understand that to be in the least degree touched by *Hill* v. *Crook* (2) and the other cases to which I have referred. Some of those cases have gone very far; still, in order to give to illegitimate children anything under the term "children," one must ascertain from the language of the testator's will, construed, no doubt, by the light of surrounding circumstances, that he must have intended to include them under that description. The Vice-Chancellor declines to go further and say that the next of kin, although the children themselves might have taken, should be let in. He says: "What the testator has attempted to do is this"—apparently he gives him credit for having intended it—"to declare that his children, though illegitimate, shall be regarded as if they were legitimate; and then, to say that under the description 'next of kin' shall be let in all th persons who would have been their next of kin had they been legitimate. I apprehend that is an attempt which the law will not permit to succeed." So here the testator was entitled to treat his illegitimate children as legitimate; but then he wishes to include as next of kin all persons who on that footing would be related in blood to those children. I recognise that that was the testator's wish, but I cannot give effect to it because, in the language of the Vice-Chancellor, "I apprehend that is an attempt which the law will not permit to succeed." I am a little puzzled by the observations of Stirling J. in *In re Deakin* (3), because I cannot suppose that he would have

(1) L. R. 5 Eq. 309, 310. (2) L. R. 6 H. L. 265.
(3) [1894] 3 Ch. 565, 573.

attempted to overrule a decision of Wood V.-C. He might have examined the case, and might have pointed out how it was distinguishable from the case before him, or he might have said that it was practically overruled by other authorities and ought not to be followed. If he had said that, it is quite possible that I might have felt bound to follow him. But he says this: "The case of *In re Standley's Estate* (1), decided by Lord Hatherley when Vice-Chancellor, was relied upon as an authority adverse to the conclusion at which I have arrived. I must confess myself unable effectually to distinguish it; but it was decided before *Crook* v. *Hill*. (2) The reasoning on which the decision was based appears to me to be inconsistent with the principles there laid down, and, notwithstanding the weight justly due to any decision of Lord Hatherley, I am unable to follow it, having regard to the more recent authorities, which are binding on me." Now, the learned judge had not before him the case of an attempt such as the Vice-Chancellor described to bring in as next of kin those who were not in the eye of the law next of kin, and in that respect the two cases were not the same, and they did not proceed upon similar lines. I can quite understand Stirling J. saying that the line of reasoning adopted by the Vice-Chancellor was inconsistent with the later cases, but I cannot read his judgment as saying that the attempt which was made before the Vice-Chancellor has ever been successfully made. Wood V.-C. has held that the law will not permit that attempt to be made, and, finding a decision by the Vice-Chancellor upon the neat point, I think that I am bound to follow it.

[It being admitted, having regard to *In re Hancock* (3), that the testator did not die intestate as to the daughter's share, the Court declared that it passed to her legal personal representative as if it had been bequeathed to her absolutely.]

Solicitors: *Indermaur, Clark & Parker; Field, Roscoe & Co.*

(1) L. R. 5 Eq. 303. (2) L. R. 6 Ch. 311; 6 H. L. 265.
(3) [1901] 1 Ch. 482.

H. B. H.

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Aug. 2.

## *In re* ALSTON.
## ALSTON *v.* HOUSTON.

[1901 A. 543.]

*Settlement—Tenant for Life and Remainderman—Investment—Proceeds of Realization of Insufficient Security—Apportionment.*

Funds subject to the trusts of a settlement comprised a mortgage security which, pursuant to the trusts, was transferred to the trustees. The interest was irregularly paid, and ultimately the security was realized at a considerable loss:—

*Held*, that the sum realized ought to be apportioned between the tenant for life and remaindermen under the settlement in proportion to the amounts due at the date when it was recovered in respect of arrears of interest and in respect of principal.

The principle of *In re Moore*, (1885) 54 L. J. (Ch.) 432; 33 W. R. 447, preferred to that of *In re Foster*, (1890) 45 Ch. D. 629.

ADJOURNED SUMMONS.

By an indenture of settlement dated August 16, 1882, and made between Rowland Crewe Alston of the first part, Mary Elizabeth Houston (then Mary Elizabeth Johnson, spinster) of the second part, and William Knibb Greenway, Frederick Bosomworth, and Francis Beilby Alston of the third part, being the settlement made on the marriage of Rowland Crewe Alston and Mary Elizabeth Houston, the share and interest of M. E. Houston under the will of her grandfather, Robert Johnson, deceased, in the moneys to arise from the sale and conversion into money of his residuary real and personal estate was (together with other property) assigned to the trustees of the settlement upon trust that they should require the transfer or payment to them of such moneys and premises as soon as the same should become payable, and should either retain the same in their then state of investment or, with the consent in writing of M. E. Houston during her life, and after her decease at their absolute discretion, sell the same or any part thereof, and, with such consent or at such discretion as aforesaid, invest the money to arise from such sale in manner therein mentioned, and should stand possessed of the same moneys and premises and the

investments for the time being representing the same in trust to pay the income thereof to M. E. Houston during her life for her separate use without power of anticipation, and after her decease in trust to pay the said income to R. C. Alston during his life, and from and after the decease of the survivor of the said M. E. Houston and R. C. Alston should hold the said trust funds in trust for the children of the said marriage in manner therein mentioned.

There was issue of the marriage three children, all of whom were infants.

On July 28, 1896, a decree absolute was made at the instance of R. C. Alston for the dissolution of the marriage between R. C. Alston and M. E. Houston (then M. E. Alston), and on the same day the Court ordered that the life interest of M. E. Houston under the settlement in the share of the estate of Robert Johnson thereby settled should be extinguished, and that, so far as regarded such life interest and the life interest of R. C. Alston in the event of his surviving M. E. Houston, the settlement should be read in all respects as if M. E. Houston were dead, and had died in the lifetime of R. C. Alston, and certain powers conferred on M. E. Houston by the settlement, including her power to consent to changes of investment, were extinguished.

In 1896 M. E. Houston intermarried with her present husband.

The trust funds coming to the hands of the trustees of the settlement under the will of Robert Johnson comprised a sum of 3257*l.* 14*s.* 1*d.*, secured with interest at 4 per cent. by a mortgage of certain leasehold hereditaments effected by an indenture of mortgage dated March 31, 1886. By an indenture of transfer dated April 21, 1886, this mortgage was duly transferred to the then present trustees of the settlement, and by a subsequent indenture of transfer dated July 31, 1889, the mortgage was duly transferred to Francis Beilby Alston and Russell James Kerr, the existing trustees of the settlement.

After the date of the first-mentioned transfer, payments in respect of interest on the mortgage were made very irregularly, and in June, 1896, there being then considerable arrears of

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interest due, the trustees went into possession of the mortgaged property and collected the rents.

On October 12, 1900, the property comprised in the mortgage was sold by the trustees, and realized 1825*l.* gross. This amount was liable to reduction for costs of sale and other charges, and it was estimated that the balance remaining in the trustees' hands would not exceed the sum of 1742*l.* 2*s.* 6*d.*

The total interest which ought to have been paid on the mortgage for the period between April 1, 1887, and October 15, 1900, amounted (after deducting tax) to 1711*l.* 17*s.* 6*d.* The interest actually paid during that period amounted to 554*l.* 11*s.* 7*d.*, and the net rents received by the trustees amounted to 476*l.* 0*s.* 11*d.*, making a total of 1030*l.* 12*s.* 6*d.* received by way of interest on the mortgage debt. The arrears of interest on the mortgage thus amounted to 681*l.* 5*s.*

This summons was taken out by the trustees of the settlement as plaintiffs against M. E. Houston and R. C. Alston and his children as defendants, for the determination of the question how the amount realized in respect of the mortgage ought to be distributed as between the successive tenants for life on the one hand, and the children interested in remainder on the other hand, so as to apportion fairly between them the loss which had occurred.

*Popham*, for the trustees, stated the case to the Court.

*Warrington, K.C.*, and *O. L. Clare*, for Mrs. Houston. There are two conflicting principles of apportionment, namely, that adopted by Kay J. in *In re Foster* (1), and followed by Farwell J. in *In re Bird* (2), and that adopted by Pearson J. in *In re Moore*, (3), and followed by North J. in *Lyon* v. *Mitchell* (4); and it is submitted that the latter of the two methods is applicable to the present case. In *In re Foster* (1) Kay J. held in effect that in making the calculation the whole matter must be inquired into from the beginning. He directed that the capital moneys produced by the sale of the insufficient security and all the moneys received by the tenant for life

(1) 45 Ch. D. 629.
(2) [1901] 1 Ch. 916.
(3) 54 L. J. (Ch.) 432; 33 W. R. 447.
(4) W. N. (1899) 27 (6).

should be added together and treated as the fund recovered, and that the total sum should be divided between the tenant for life and remaindermen in the proportions of the amounts to which they would respectively have been entitled if the security had been sufficient, the tenant for life giving credit for income actually received. If this method of apportionment were adopted, Mrs. Houston would get nothing, as the amount actually paid to her by way of income would exceed the apportioned amount. The other mode of apportionment, namely, that in *In re Moore* (1), is to take the amounts due at the time when the security is realized, i.e., the amount of the capital and the amount due for arrears of interest to the tenant for life, and to apportion the sum recovered accordingly. In the case of *In re Moore* (1) it is not clear that the point as to the proper mode of apportionment was argued; but in *Lyon* v. *Mitchell* (2) it was considered, and *In re Foster* (3) was expressly dissented from by North J. In *In re Barker* (4) Stirling J. followed *In re Moore* (1), and is reported to have intimated the opinion that the apportionment in *In re Foster* (3) was intended to be confined to the case of a mortgagee in possession. That intimation is difficult to follow, but it must be taken as shewing disapproval of *In re Foster*. (3) The defect of *In re Foster* (3) is that, if the principle were carried out logically, a tenant for life who had rightfully received income might be called upon to refund—a thing unheard of. *In re Bird* (5) was a case of breach of trust, and the Court was called upon to replace the parties interested in the positions in which they would have been if no breach of trust had been committed. In such a case some principle of apportionment similar to that in *In re Foster* (3) must necessarily be resorted to.

*Davenport*, for R. C. Alston and his children. R. C. Alston desires to support the case of his children, the remaindermen. The true principle governing these cases is that enunciated by James V.-C. in *Cox* v. *Cox* (6), namely, that "neither the tenant

(1) 54 L. J. (Ch.) 432; 33 W. R. 447.
(2) W. N. (1899) 27 (6).
(3) 45 Ch. D. 629.
(4) W. N. (1897) 154 (14).
(5) [1901] 1 Ch. 916.
(6) (1869) L. R. 8 Eq. 343, 344.

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for life nor the remainderman is to gain an advantage over the other, neither is to suffer more damage in proportion to his estate and interest than the other suffers." That principle is carried out and applied by the decision in *In re Foster* (1), which ought to be followed here, but not by *In re Moore.* (2) That case is not a satisfactory one: the real point in it was whether or not compound interest was to be allowed, and the cases in which it was followed are shortly reported, and may have turned upon special circumstances. No doubt cases may occur in which the principle of apportionment of *In re Moore* (2) would work fairly; but as a general principle it is defective, because it takes no sufficient consideration of what the tenant for life has received, as, e.g., where interest in full for a series of years has been paid in respect of an insufficient security. *In re Barker* (3) was not the case of a trust investment, but of a charge created by the testator himself. It is no part of the principle of *In re Foster* (1) that the tenant for life should refund, but only that he should account for, or bring into hotchpot, what he has received; and this is manifestly required if the principle of *Cox* v. *Cox* (4) is to be carried out.

*Warrington, K.C.*, in reply.

KEKEWICH J. The attempt which I had contemplated to discriminate between the conflicting authorities must be abandoned. In reference to that subject, I agree with what is said by Farwell J. in the case of *In re Bird.* (5) It may be that each of the two methods of apportionment is right under particular circumstances. The cases in the *Weekly Notes* are very shortly reported, and I think that the only thing which can be usefully gleaned from them is that in the case of *Lyon* v. *Mitchell* (6) North J. did not follow *In re Foster* (1), but apparently adopted the same method of apportionment as that adopted by Pearson J. in *In re Moore.* (2) I must endeavour to find some principle contained in the cases, or at all events

(1) 45 Ch. D. 629.
(2) 54 L. J. (Ch.) 432; 33 W. R. 447.
(3) W. N. (1897) 154 (14).
(4) L. R. 8 Eq. 343, 344.
(5) [1901] 1 Ch. 916.
(6) W. N. (1899) 27 (6).

not inconsistent with them, which may be applied to the facts of the present case. I have before me the old case of *Turner* v. *Newport*. (1) It was the case of a bond given by will as part of the residue of the testator's estate. No principal or interest was paid, and nothing was recovered for many years; but at length something was recovered, and Lord Cottenham said this (2): "At length a sum is realized; and then, when the question arises what part of it is, as between the parties, to be considered as principal, the tenant for life is told that, because the gross sum recovered is less than the amount of the original debt, she is to have nothing. Such a proposition is contrary to the plainest principles of justice, particularly when it is considered that the Court itself has restrained her from getting in the debt sooner, in the hope that more might be ultimately recovered." That observation was by the way. "But the other proposition is equally untenable—that she is entitled to the whole of what has been recovered in respect of interest since the testatrix's death." And then he solved it, or rather put it in the way of solution, by referring it back to the master to inquire what was the value of the bond at the death of the testator and to calculate interest, there being an intimation that the sum calculated as interest was to be paid to the tenant for life. That would not work here, because the facts are different, but a principle may be deduced from the case. A sum has been realized which is not sufficient to pay the principal and arrears of interest. The result is that it must be ascertained in some way what is the fair division between those who are entitled to interest and have not received it in full, and those who are entitled to the capital and will not receive it in full. It seems to me that the simplest and most logical way of dealing with that is to apportion the amount which you have actually got between the two estates which are beneficially interested in that amount—the estate of the tenant for life, or successive tenants for life, as in this case, on the one hand, and the estate of the remainderman on the other hand. The real question is what is due to each at the time of realization. Of course, if a tenant for life has received money

(1) (1846) 2 Ph. 14. (2) 2 Ph. 17.

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he must give credit for that; but what you have to ascertain is what is due at the date when you recover the money. That view, as I understand it, agrees with the decision of Pearson J. in *In re Moore*. (1) It does depart from the decision of Kay J. in *In re Foster* (2), but the explanation of that decision may be that it is one only to be applied to the peculiar circumstances, and in the case of *In re Barker* (3) Stirling J. appears to have intimated an opinion that the apportionment in *In re Foster* (2) was intended to be confined to the case of a mortgagee in possession. That distinction does not altogether commend itself to my mind. In the present case the amount which has been recovered must be apportioned between capital and income in proportion to the amounts due at the date when it was recovered in respect of arrears of interest and in respect of principal. As between the successive tenants for life, the amount attributed to interest will be apportioned in proportion to the arrears due to them respectively.

Solicitors: *Newman, Paynter & Co.; Lydall & Sons; Cunliffes & Davenport.*

(1) 54 L. J. (Ch.) 432; 33 W. R. 447.

(2) 45 Ch. D. 629.

(3) W. N. (1897) 154 (14).

C. C. M. D.

## *In re* GUYTON AND ROSENBERG'S CONTRACT.

COZENS-HARDY J.

1901

*July* 11, 24.

[1901 G. 373.]

*Will—Construction—Devise of Real Estate—Lease.*

A testator devised "all my real estate" to one, and bequeathed "all my leasehold estate" to others. He died entitled to the fee simple of certain houses in fee subject to a term, and also entitled to a sub-lease of them for the term less two days outstanding in a mortgagor. He had other freeholds and leaseholds:—

*Held*, that all the testator's interest in the houses passed by the devise.

THIS was a summons under the Vendor and Purchaser Act, 1874, taken out by a purchaser of freehold houses to have it declared that the vendors had not made out a good title.

The vendors were devisees in trust under the will of William Guyton. William Guyton, who died in June, 1884, had possession of the property under the will of William Robert Roberts.

In 1820 the premises were demised for ninety-nine years at a ground rent of 12*l.* 12*s.* In 1823 the lease was mortgaged by way of sub-lease for the whole term less two days. In 1842 the sub-lease was sold and assigned by the mortgagees to Mr. Rippingham, a predecessor of the vendors. In 1848 the reversion in fee was conveyed to Mr. Rippingham. Mr. Rippingham devised his freehold houses at St. George's-in-the-East to William Robert Roberts, who, on the death of Mr. Rippingham in May, 1865, entered and had possession till he died in 1872.

William Robert Roberts made a will, dated 1871, whereby he gave and devised "all my real estate, whether in possession, reversion, or remainder, to my friend William Guyton, of 9, Alexandra Road, Norwich, his heirs and assigns, subject to any mortgages affecting the same, and subject also to the payment" of certain annuities. He bequeathed all his leasehold estate to other persons.

The vendors sold to the purchaser Rosenberg subject to the

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following condition: "The title shall commence with a conveyance dated 25th August, 1848, whereby a predecessor of the deceased acquired the freehold subject to a lease dated 16th November, 1820, at a ground rent of 12*l.* 12*s.* 0*d.* Such predecessor had previously acquired the said lease from a mortgagee by demise, and no objection shall be taken on the ground that the last few days of the said term may be outstanding."

On behalf of the purchaser a requisition was made that a good title had not been made because the sub-lease did not pass under the will of William Robert Roberts by the devise of freehold estate to William Guyton, but passed under the bequest of leasehold estate. The question before the Court was whether this requisition was justified.

*J. M. Stone*, for the purchaser. The case is not within the words of s. 26 of the Wills Act, which enacts that a general devise of land shall include copyhold and leasehold, for the testator has devised his "real estate," not his "land." Unless there is some special reason from the surrounding circumstances or the context of the will, a leasehold interest is not included in a devise of real estate, notwithstanding s. 26 of the Wills Act: *Wilson* v. *Eden* (1); *Butler* v. *Butler* (2); *In re Davison* (3); *In re Uttermare.* (4) Here the testator has given his real estate in one way, his leaseholds in another, and so distinctly separating them.

*Peterson*, for the vendor. The houses here the subject of contract had, both by the testator and his predecessors, been practically owned and treated as freehold houses. It would be unnatural to suppose that the testator intended to split the ownership up. The tenor of the will is contrary to such a supposition. Apart from s. 26 of the Wills Act, the intention to be derived from the words of the will is to give the property in which he had a freehold interest one way, and the property in which he had a leasehold interest only another way:

(1) (1848) 11 Beav. 237.
(2) (1884) 28 Ch. D. 66.
(3) (1888) 58 L. T. 304.
(4) W. N. (1893) 158.

*Mathews* v. *Mathews* (1); *In re Davison* (2); *Moase* v. *White* (3); *Vallance* v. *Vallance*. (4)

*J. M. Stone*, in reply.

July 24. COZENS-HARDY J. (after stating the facts). I think it is clear that s. 26 of the Wills Act does not help the vendors. I cannot hold that under the devise of "all my real estate" leaseholds are included, when I find in the same will an express bequest of "all my leasehold estate." This is a "contrary intention" appearing by the will. It remains, however, to consider whether, under the language of this will, and having regard to all the surrounding circumstances, the devise to Guyton, which must be read as a devise of all the testator's freehold property, did not include all his interest in these houses which were his freehold. Upon the whole, I think this is the true view. It seems to me to be consistent with the judgment of Wood V.-C. in *Mathews* v. *Mathews*. (1) The testator cannot have intended to split up this property into two parts, when it had for many years been enjoyed and dealt with as a freehold estate in possession. The devise passed all his interest in the houses, which were his freehold, and not merely his freehold interest in these houses subject to his leasehold interest therein.

The result is that I must declare that the purchaser's objection is not well founded, and the purchaser must pay the costs of the summons.

Solicitors: *Stones, Morris & Stone; Storey, Cowland & Hill.*

(1) (1867) L. R. 4 Eq. 278.
(2) 58 L. T. 304.
(3) (1876) 3 Ch. D. 763.
(4) (1863) 2 N. R. 229.

D. P.

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*July* 17; *Aug.* 6.

## FLEMING *v.* LOE.

[1897 F. 1136.]

*Vendor and Purchaser—Voidable Contract—Assignment of Contract—Money had and received.*

A contract of sale was induced by and voidable for misrepresentations made by the vendor. The vendor assigned the benefit of the contract, and payments made as under the contract by the purchaser, before he elected to avoid it, were received by the vendor's assignee. The assignee sued for specific performance, making the vendor and purchaser defendants; the action was dismissed:—

*Held*, that the purchaser could recover his payments by counter-claim as on a total failure of consideration.

*Aberaman Ironworks* v. *Wickens*, (1868) L. R. 5 Eq. 485; 4 Ch. 101, explained on the ground that the Court of Chancery then had no jurisdiction to deal with a legal claim for money had and received.

THIS was the trial of a counter-claim.

The transactions out of which the action and counter-claim arose were as follows:—

By an agreement dated July 16, 1896, and made between Neill (called the vendor) and Thomas, his attorney, and the defendant Loe (called the purchaser), the vendor agreed to sell certain mining leases or mining claims in West Australia for 42,500*l.*, payable partly in cash and partly in shares in a company to be formed. By clause 7 the vendor, until November 1, 1896, was to continue to work and develop the mines and to comply with the obligations of the mining leases and mining laws of the colony. By clause 8, until completion of the purchase the purchaser was on the day of the date of the agreement, and monthly on the 15th day of each month succeeding the date thereof, to pay to the vendor the sum of 400*l.* towards the expenses incurred since January 1, 1896, and to be incurred in working and developing the mining properties. Upon completion of the purchase the vendor was to account for all moneys received by him, and if any balance should remain in his hands in respect of the payment of 400*l.* per month the amount of the balance should be repaid to the pur-

chaser. By clause 9 the purchase was to be completed in London on or before November 8, 1896; and by clause 20, if the vendor failed to shew a title, the purchaser was at liberty to rescind the agreement, and upon so doing should be entitled to the repayment of all moneys paid by him in respect of the property.

By an agreement dated July 18, 1896, between Loe of the one part and Mackusick of the other part, Loe agreed to sell the same property to Mackusick for 65,000*l.*, payable as to 500*l.* in cash on the signing of the agreement, and as to the balance partly in cash and partly in shares on completion. The agreement contained similar clauses as to working and developing the mine, and as to rescinding the contract in the event of failure to shew a title, except that Mackusick was to contribute only 230*l.* per month until November 1, 1896.

Loe was known (as the Court held on the evidence) to be wholly without means, and Mackusick signed the agreement of July 18, 1896, only on having a written guarantee from Fleming of even date in the following terms:—

"Referring to the contract entered into by Mr. W. C. Loe with you for the sale to you of the Lombardy group of mines in W. A., I hereby guarantee the performance by Mr. Loe of the obligations undertaken by him to you under such contract."

Loe at or about the same time gave to Fleming the following document: "In consideration of your having at my request guaranteed the performance by me of my contract with Mr. H. M. Mackusick for sale of the Lombardy group of mines, I hereby undertake and agree to assign to you or to any person you may appoint the contract made by me for purchase of such mines, which contract I now deposit with you, and also to assign to you or to any such person the contract between Mr. Mackusick and myself, which I also deposit with you." This last document was not communicated to Mackusick.

As between himself and Loe, Fleming claimed the right to receive the sums payable by Mackusick under the agreement of July 18, 1896. And after applications from Fleming's

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solicitors, Mackusick paid the deposit and four instalments of 230*l.* each to Fleming's solicitors, who sent cheques for 400*l.* to the original vendor in accordance with the agreement of July 16, 1896.

In July, 1897, Fleming commenced the present action against Loe and Mackusick, and claimed specific performance of the agreement of July 18 and damages. Mackusick put in a defence, by which he alleged his contract with Loe was procured by misrepresentation and was not binding on him. He also counter-claimed for repayment of the 500*l.* deposit and the four several sums of 230*l.* paid by him.

The action was tried before Cozens-Hardy J. in October, 1899. At that time the mining claims the subject of the action had been determined. His Lordship gave judgment in the action for the plaintiff. The counter-claim stood over. Mackusick appealed, and the Court of Appeal reversed the decision below and dismissed the action.

The counter-claim now came on for hearing, having been amended. Loe was dead, and there was no personal representative.

*Upjohn, K.C.*, and *D. D. Robertson*, for Mackusick. Fleming having intervened in the contract between Loe and Mackusick, and received payments from the latter, he did so on condition that if there was no contract he should refund. The counter-claim is really an action for money had and received for a consideration that failed: *Werderman* v. *Société Générale d'Électricité* (1); *Aspden* v. *Seddon* (2); *Moses* v. *Macferlan.* (3)

*Eve, K.C.*, and *Martelli*, for Fleming. The money sued for was paid by Mackusick under his contract with Loe. There was no privity between Mackusick and Fleming; the only person liable to Mackusick is Loe: *Tasker* v. *Small* (4); *Aberaman Ironworks* v. *Wickens* (5), a case on all fours with the one now before the Court.

*Upjohn, K.C.*, in reply.

(1) (1881) 19 Ch. D. 246.
(2) (1876) 1 Ex. D. 496.
(3) (1760) 2 Burr. 1005, 1012.
(4) (1837) 3 My. & Cr. 63; 45 R. R. 212.
(5) L. R. 5 Eq. 485; 4 Ch. 101.

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Aug. 6. COZENS-HARDY J. (after stating the facts) :—Mackusick now seeks to recover from Fleming the various sums paid by him under the contract. Fleming repudiates all liability on the ground that he was not a party to the contract with Mackusick, and that Mackusick's only remedy is against Loe's representative when constituted.

It is reasonably clear that Mackusick cannot claim anything under Fleming's guarantee. Nothing is due from Loe in respect of any obligation undertaken by him under the contract. Mackusick is not suing for breach of the contract.

But Mackusick alleges that the deposit and the several sums of 230*l.* were paid by him to Fleming as assignee of the contract, and not as agent for and on behalf of Loe, and that although there was no contract of sale between him and Fleming, yet he is entitled to recover the sums so paid on the ground of a total failure of consideration.

It is urged on the part of Fleming that the case of *Aberaman Ironworks* v. *Wickens* (1) is decisive in his favour, because it was there held that, although the purchaser was entitled to relief against Wickens, his vendor, no relief could be given against Wilkinson, Sudlow, and Sarl, into whose hands part of the purchase-money had come. I do not agree with this contention. Malins V.-C. dismissed the bill against all the defendants without prejudice to the rights of the plaintiff at law. On appeal, Lord Cairns reversed the decision so far as Wickens was concerned, but gave no relief against the other defendants in the shape of repayment, the money not having been obtained by fraud or impressed with any trust. In other words, the Court of Chancery had no jurisdiction to deal with a simple money demand of that nature, and the parties were left to assert such rights, if any, as they might have by an action at law. That case did not decide the question which now arises for my decision.

Mackusick must succeed, if at all, on the footing that this is a claim for money had and received on a total failure of consideration. The circumstances are peculiar, but I think Fleming, having regard to his conduct, including his

(1) L. R. 5 Eq. 485; 4 Ch. 101.

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proceedings in the present action, cannot successfully contend that this money was not received by him. I must, therefore, give judgment for Mackusick for the several sums paid by him to Fleming; and Fleming must pay the costs of the counter-claim.

Solicitors: *Last & Sons; Morten, Cutler & Co.*

D. P.

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*July* 31; *Aug.* 8.

## LOWE *v.* ADAMS.

[1901 L. 1213.]

*Landlord and Tenant—Sporting Right—Yearly Hiring—Notice to Determine.*

A verbal notice to determine a right to shoot pheasants, enjoyed from year to year at an annual payment, was given early in March for the 25th then instant, being the end of the current year:—

*Held*, that the notice was reasonable.

THIS was the trial of an action to restrain interference with sporting rights. The plaintiff claimed to be entitled to the exclusive right to shoot and preserve pheasants under a grant from the landowner. The defendants Adams and King claimed a prior right under the following circumstances:—

By a memorandum of agreement dated May 14, 1895, between Mr. Sparrow, called the landlord, of the one part, and the defendants, called the tenants, of the other part, the landlord agreed to let, and the tenants agreed to hire, all the shooting in White Ash Wood and pheasant shooting within the adjoining fields of the said wood in the parish of Bocking for the term of one year from March 25, 1895, to March 25, 1896, the rent to be 23*l.* per annum, payable half-yearly—namely, 11*l.* 10*s.* on signing the agreement and the balance on December 25 next, the landlord to pay all outgoings—namely, tithes, rates, and taxes, the landlord further agreeing not to kill any game within White Ash Wood or pheasants within the above-mentioned limit from the said wood, nor to allow any one in his employ to do the same. It was provided that the tenants or their keepers should have the right to drive

pheasants into the wood from the adjoining field, and that the landlord or his two woodmen should be allowed to enter the wood for the purpose of cutting underwood and felling trees. This document was not under seal. On December 30, 1895, the landowner wrote to the defendant Adams a letter in the following terms: "Many thanks for cheque for shooting which arrived quite safely. I consent to the rent for White Ash Wood being reduced from 23*l.* to 21*l.* per annum, hoping this proposal will be satisfactory to you."

From Lady Day, 1896, the defendants continued to enjoy shooting rights over the wood and they paid 21*l.* a year, sometimes half-yearly and sometimes in one sum. No other document was executed. Early in the year 1901 the landlord informed the defendants that the arrangement was revoked as from March 25. There was dispute as to the exact date of the notice, but upon the whole his Lordship considered that verbal notice was given in February, or at the latest early in March, although written notice was not given till March 23. The shooting had been let to the plaintiff by deed at an increased rent of 50*l.* a year.

*Vernon Smith, K.C.*, and *Herbert Jacobs*, for the plaintiff. On the facts we say that for the year ending March 25, 1901, the defendants hired the shooting for a year certain, and even if their position was similar to a tenant of agricultural land their interest expired at that date.

But they were not tenants of land—they were mere licensees, and their licence, not being coupled with a grant, was liable to revocation at a moment's notice and was revoked. The only remedy of the licensee is an action for breach of covenant or implied covenant not to revoke: *Wood* v. *Leadbitter* (1); *Kerrison* v. *Smith* (2); *Cornish* v. *Stubbs* (3); *Mellor* v. *Watkins*. (4) The plaintiff, being grantee of a profit à prendre, has right of action to prevent disturbance: *Fitzgerald* v. *Firbank*. (5) Such a thing as a lease, like an agricultural lease,

(1) (1845) 13 M. & W. 838, 840.
(2) [1897] 2 Q. B. 445.
(3) (1870) L. R. 5 C. P. 334, 339.
(4) (1874) L. R. 9 Q. B. 400.
(5) [1897] 2 Ch. 96.

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of an incorporeal hereditament is an anomaly: no rent can be payable in respect of an incorporeal hereditament; the analogy between a tenancy of land and an incorporeal hereditament fails: Coke on Littleton, 47 a, 142 a; *Hancock* v. *Austin* (1); *Marquis of Camden* v. *Batterbury*. (2) Assuming that the defendants were in an analogous position to tenants from year to year, so far as to be entitled to reasonable notice of determination of a right to sport, they were not entitled to six months' notice. Looking at the nature of the sporting right claimed, reasonable notice was given: *Wilson* v. *Tavener*. (3)

*Eve, K.C.*, and *Martelli*, for the defendants. A right of sporting is an incorporeal hereditament, a good subject of a lease: *Hooper* v. *Clark*. (4)

There was originally at least an agreement in writing for a lease for a year, and evidence of a contract to continue the holding at the reduced rent. The tenant under a void lease or an agreement, who has entered and paid rent, is in the same position in equity as if a valid grant had been made: *Nunn* v. *Fabian* (5); *Miller and Aldworth* v. *Sharp* (6); *McManus* v. *Cooke*. (7) The effect of the Judicature Act was, therefore, that the doctrine of *Wood* v. *Leadbitter* (8) ceased to be applicable: *Walsh* v. *Lonsdale*. (9)

There was no reason why the same rules as to becoming a tenant from year to year or holding over and being entitled to six months' notice to quit, as laid down in *Clayton* v. *Blakey* (10), should not apply to a holding of sporting rights.

*Vernon Smith, K.C.*, in reply.

Aug. 8. COZENS-HARDY J. (after stating the facts as above). Various points have been raised in argument upon which I do not think it necessary to express a decided opinion. Whether *Wood* v. *Leadbitter* (8) is still good law, having regard to *Walsh* v. *Lonsdale* (9), is very doubtful. But the agreement

(1) (1863) 14 C. B. (N.S.) 634.
(2) (1859) 5 C. B. (N.S.) 808, 816.
(3) [1901] 1 Ch. 578.
(4) (1867) L. R. 2 Q. B. 200.
(5) (1865) L. R. 1 Ch. 35.
(6) [1899] 1 Ch. 622.
(7) (1887) 35 Ch. D. 681.
(8) 13 M. & W. 838.
(9) (1882) 21 Ch. D. 9.
(10) (1798) 8 T. R. 3; 4 R. R. 575.

of May 14, 1895, was something more than a mere licence. It conferred a right to shoot and carry away the game when shot: *Fitzgerald* v. *Firbank* (1), and it was not revocable at will. Assuming that the defendants could not have been deprived of the enjoyment of their shooting rights before Lady Day, 1896, what was their position after that day? The defendants contend that by payment of rent they became tenants from year to year and were entitled to a six months' notice, ending at Lady Day, 1902. Now a general occupation of land was, so long ago as the year-books, held to be an occupation from year to year, and the tenant could not be turned out without reasonable notice: *Doe* v. *Watts*. (2) And reasonable notice has been settled to be a half-year's notice ending with the period at which the tenancy commenced. This whole doctrine seems to have owed its origin to the presence of a strong and natural feeling of the justice and good policy of allowing a tenant who has sowed to reap: see Smith's Leading Cases, 10th ed. vol. ii. p. 126. But I am not satisfied that the rigid rules applicable to a tenancy of corporeal hereditaments ought to be applied to the enjoyment of an incorporeal hereditament such as I have to deal with.

I assume in favour of the defendants that they were entitled to "reasonable notice," expiring at Lady Day. If so, I think the verbal notice given in February, or at the latest in the early part of March, after the end of the shooting season, was reasonable and sufficient. I do not feel bound to hold that, in a case of this kind, six months' notice must be given.

The result is that in my opinion the plaintiff is entitled to the relief claimed in the action. The damages are agreed at 40*s*. The defendants must pay the costs of the action.

Solicitors: *Griffinhoofe & Brewster, for Surridge, Coggeshall; Morris & Bristow, for Harris, Morton & Harris, Halstead.*

(1) [1897] 2 Ch. 96. (2) (1797) 7 T. R. 83, 85; 4 R. R. 387, 389.

D. P.

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*Aug.* 1, 2, 10.

## DIXON *v.* STEEL.

[1901 D. 547.]

*Principal and Surety—Mortgage—Collateral Security.*

The right of a surety to the benefit of a collateral security is not in abeyance till he is called on to pay.

*South* v. *Bloxam*, (1865) 2 H. & M. 457, explained.

THIS was a summons by a married woman to redeem leasehold house property which she had mortgaged to secure a debt of her husband, secured also on a leasehold house of the husband. The defendants were the mortgagees and the husband. The mortgagees were also judgment creditors of the husband in respect of a debt not covered by the mortgage. They had obtained equitable execution of the husband's interest in his mortgaged property. The husband's mortgaged property had been sold by order of the Court in the proceedings to enforce equitable execution. The question now before the Court on further consideration was whether the plaintiff was entitled to have the whole of the sum realized taken into account in ascertaining the amount of redemption money, or whether the mortgagees were entitled to payment of their judgment debt and costs, so that the balance only of the amount realized should be deducted from the mortgage debt in ascertaining what was due. The facts are set out in more detail in the judgment.

*Micklem, K.C.*, and *Douglas*, for the plaintiff. The plaintiff was a surety, and is entitled to redeem and have the benefit of all collateral security given to the creditor, who cannot tack a subsequent incumbrance against the surety: *Forbes* v. *Jackson* (1); *Rouse* v. *Bradford Banking Co.* (2); *Arden* v. *Arden* (3); *Pearl* v. *Deacon*. (4) It is not material whether the creditor

(1) (1882) 19 Ch. D. 615.
(2) [1894] A. C. 586.
(3) (1885) 29 Ch. D. 702.
(4) (1857) 1 De G. & J. 461.

had notice that the plaintiff was surety only: *Overend, Gurney & Co.* v. *Oriental Financial Corporation.* (1)

*Martelli,* for the defendant mortgagees. I admit that there is a primâ facie presumption that the wife was surety only, but the question is one of fact, and the primâ facie presumption has been rebutted: *Hudson* v. *Carmichael* (2); *Ferguson* v. *Gibson.* (3) Admitting that the plaintiff was surety only, her right has not matured, because she has never been called upon to pay anything: Rowlatt on Principal and Surety, 212: *South* v. *Bloxam* (4); *In re Toogood's Legacy Trusts.* (5)

*Micklem, K.C.,* in reply.

*Cur. adv. vult.*

Aug. 10. COZENS-HARDY J. By a mortgage dated January 12, 1894, John Dixon mortgaged certain property (A) to Thomas Steel to secure 225*l.* and interest. By a mortgage dated March 20, 1896, Mrs. Dixon mortgaged certain other property (B) to Thomas Steel to secure 275*l.* and interest.

By a mortgage dated August 5, 1896, and made between John Dixon of the first part, Mrs. Dixon of the second part, and Thomas Steel of the third part, in consideration of 500*l.* advanced by Thomas Steel to John Dixon, John Dixon and his wife jointly and severally covenanted to pay the 500*l.* with interest; and John Dixon as to property A, and Mrs. Dixon as to property B, charged the properties with the 500*l.* and interest. And Mrs. Dixon mortgaged certain other property (C) to Thomas Steel to secure the 500*l.*, and also the two sums of 225*l.* and 275*l.* secured by the prior mortgages.

The 500*l.* advanced on this security had been paid off, but the deed was used again as security for a sum of 500*l.* advanced by Thomas Steel on April 20, 1898; it had never ceased to be a further security for the 225*l.* and 275*l.*

On the evidence I am satisfied that Mrs. Dixon was only a surety for her husband.

On June 13, 1899, Messrs. Steel, Maitland & Steel, who

(1) (1874) L. R. 7 H. L. 348.
(2) (1854) Kay, 613, 620.
(3) (1872) L. R. 14 Eq. 379.
(4) 2 H. & M. 457.
(5) (1889) 61 L. T. 19.

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were judgment creditors of John Dixon, obtained equitable execution against him. Before this date they had been informed that Mrs. Dixon was a surety for her husband.

On August 14, 1899, Thomas Steel transferred all his mortgages to Messrs. Steel, Maitland & Steel.

By an order made by North J. on December 2, 1899, in the matter of the statute 27 & 28 Vict. c. 112, an Act to amend the law relating to future judgments, statutes, and recognizances, and in the matter of John Dixon, on the application of Messrs. Steel, Maitland & Steel, certain inquiries were directed to ascertain what was due under the judgment, what interests in land of the said John Dixon had been delivered in execution, and what liens, charges, and incumbrances there were.

The master made his certificate dated April 3, 1900, and found that the property delivered in execution was an equity of redemption in property A, and that the incumbrances were the mortgages of January 12, 1894, and August 5, 1896, but that Mrs. Dixon claimed to be party to the mortgage of August 5, 1896, as surety for John Dixon.

Pursuant to subsequent orders, the property was sold for 375*l.* to one Thomas Stockdale, who was authorized to pay to Messrs. Steel, Maitland & Steel, as transferees of the first mortgage, the amount due on that mortgage. Messrs. Steel, Maitland & Steel have since received the balance of the purchase-money, 130*l.* 4*s.* 1*d.*, and claim to apply it towards satisfaction of their judgment debt.

This action was commenced by Mrs. Dixon as plaintiff against Messrs. Steel, Maitland & Steel and John Dixon as defendants to redeem property C, and the only question is whether Messrs. Steel, Maitland & Steel are justified in applying that sum towards satisfaction of their judgment debt, or whether it ought not to go in relief of Mrs. Dixon's mortgage.

This sum represents the equity of redemption in A. That equity of redemption was charged together with C with the 500*l.* As between A and C, A was primarily liable. This primary liability cannot be affected by the subsequent incumbrance created by the delivery of A in execution. The money

must be applied in partial satisfaction of the 500*l.* secured on C, the surety's property.

The case thus put does not seem to present much difficulty. But it was urged by Mr. Martelli in his very able argument that as the surety has paid nothing her right has not arisen, and he relied upon some observations by Wood V.-C. in *South* v. *Bloxam* (1) in support of this contention. It is necessary to consider what was decided in that case.

Arnold mortgaged (*a*) and (*β*) to Marcon for 2800*l.*, his mother Susannah Arnold joining as surety in the covenant for payment. After the surety's death Arnold gave a further charge to Marcon on (*a*) and (*β*) for 600*l.* Subsequently Arnold mortgaged (*a*) to the plaintiffs to secure 2000*l.*

In March, 1853, Marcon commenced an action against the defendant Bloxam, the surety's executor, upon her covenant in the mortgage deed. Before the defendant pleaded, Marcon had sold (*a*) for a sum less than was due on the first mortgage. He sought to pay off his further charge of 600*l.* out of this sum. The defendant succeeded as to the 600*l.*, but failed on other points. The Court ordered the defendant to pay the balance of the debt and interest and costs, and thereupon Marcon was to assign (*β*) to the defendant, and this was done: see *Marcon* v. *Bloxam*. (2) The defendant's own costs of action were 658*l.* In 1859 the defendant received 2800*l.* in respect of (*β*), being the amount of two policies on the mortgagor Arnold's life. The plaintiffs in 1863 filed a bill claiming to have the balance of the policy moneys after payment of the first mortgage marshalled, so as to make good pro tanto what had been taken from (*a*) towards payment of the first mortgage. Wood V.-C. held the plaintiffs entitled. His judgment, so far as material, was as follows (3):—

"Upon these facts the usual equity of marshalling is claimed in favour of the second mortgagees, who insist that they are entitled to be recouped out of any balance of the policy moneys remaining after satisfaction of the first mortgage, the amount which was realized from the chattels, and applied towards

(1) 2 H. & M. 457.
(2) (1856) 11 Ex. 586.
(3) 2 H. & M. 462.

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payment of the first mortgage. The plaintiffs would clearly be entitled to payment out of this balance if the whole property had been included in both mortgages, and (the balance being less than the sum obtained by the sale of the chattels) the same right arises in the actual circumstances on the principle of marshalling, subject to any right which may arise from the defendant's position as surety. Now what are the rights of a surety? His right arises as soon as he pays the debt due from his principal, and not before. Until such payment, the fact of a person having become surety for a mortgage debt in no way prevents the principal from dealing with the property by assigning it to a second mortgagee. The surety's right is not like a charge created in the inception of the deed and to arise on a certain contingency, but only a possibility of the principal becoming indebted to him for what he may pay towards the debt, and for any costs he may incur by reason of his suretyship.

"In this case the surety, when called upon to pay, disputed his liability. Of course he was justified in having an account taken of what was due on the mortgage. So far there could be no complaint of his conduct; but he went further, and raised other questions which occasioned enormous costs. In this contest he partially failed, and did not succeed in reducing the claim against himself, except by an amount less than the costs incurred, and did not effect any reduction of the claim, which took priority over the second mortgage, except by some trifling rectification of interest.

"Upon paying the debt and costs of the action, the defendant as surety became entitled to take from the first mortgagees their security for principal, interest, and costs; and as between himself and the mortgagor (if there had been no second mortgage), the mortgagor would be liable to repay all the surety's expenses, and probably would not have been entitled to redeem the security without making such further payment. This question does not depend on the principle of *Copis* v. *Middleton*. (1) There, when the bond was paid there was no security for the surety to take; but that is no reason why, when there

(1) (1823) T. & R. 224, 229; 29 R. R. 73, n.

is a security, the principal should be allowed to get back the property without first paying the expenses which his surety has incurred.

"As against a second mortgagee the case is very different. The debt recovered in the action was less than 500*l.* The costs paid by the defendant were nearly 1100*l.*, of which 658*l.* were costs of his defence. As regards these costs of defence, I do not think that the defendant can charge any part of them against the second mortgagees. They became a debt from the mortgagor to the surety, but the possibility of such a debt arising at a future time does not prevent the mortgagor from executing an effectual second mortgage. As to the costs paid to the plaintiff in the action, it is clear that the defendant cannot be allowed to charge any costs which were not incurred for the benefit of the estate and all persons interested in it after the first mortgagees."

This only decided that the surety was not entitled to tack to his security as against a second mortgagee costs incurred in resisting the creditor's claim, except so far as they were properly incurred for the benefit of the estate. It does not seem to me to have any bearing on the present case. The observations of Wood V.-C. must be read with reference to the particular point with which he was dealing. It certainly is not the law that a surety has no rights until he pays the debt due from his principal.

I must, therefore, declare that the 130*l.* 4*s.* 1*d.* is to be taken in reduction of the 500*l.* mortgage debt.

I understand that the figures are agreed except as to this sum, and that a proper tender was made by the plaintiff.

The defendants other than John Dixon must pay the costs of the action.

Solicitors: *Ward, Bowie & Co., for Stockdale, Sunderland; Maples, Teesdale & Co., for Steel, Maitland & Steel, Sunderland.*

D. P.

FARWELL J.

1900

March 15, 16, 27.

## MANCHESTER BREWERY COMPANY *v.* COOMBS. (1)

[1900 M. 203.]

*Landlord and Tenant—Brewer's Lease—Covenant to buy Beer of Lessors and "their Successors in Business"—Covenant running with the Land—Lease executed by Lessee only—Assignment of Reversion—Breach of Covenant—Injunction at Suit of Assignee—32 Hen. 8, c. 34—Benefit of Covenant a Chose in Action—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6 *—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *ss.* 10, 58.

In 1892 A. executed under seal an agreement to take an hotel as yearly tenant to B. & Co., and thereby covenanted to purchase all his beer of B. & Co. "and their successors in business." The covenant did not mention "assigns." B. & Co. did not execute the agreement, and there was nothing on the face of it to shew that they were brewers. They were, in fact, brewers, and A. occupied the hotel under the agreement as their tenant and purchased beer of them.

In 1899 B. & Co. sold and conveyed their brewery, tied houses (including the hotel), and business to C. & Co., who were brewers, and who incorporated B. & Co.'s business with their own. After the sale B. & Co. ceased to carry on business. Notice of the change of ownership was given by C. & Co. to A., and for a time he purchased beer of them. In an action by C. & Co. to restrain A. from committing a breach of the covenant:—

*Held*, that the covenant was not personal to B. & Co., but ran with the land, and that C. & Co., as successors in business of B. & Co. and owners of the reversion in fee of the hotel, were entitled to the benefit of it:

*Held*, also, that C. & Co., as assigns of B. & Co., being clearly entitled against A. to specific performance of the agreement under which he was in possession of the hotel, could sue him on the covenant in the same manner as they could have done, if B. & Co. had actually executed the original agreement.

*Clegg* v. *Hands*, (1890) 44 Ch. D. 503, and *Walsh* v. *Lonsdale*, (1882) 21 Ch. D. 9, followed.

*Semble*: the benefit of the covenant was a chose in action, assignable in equity before the Judicature Act, 1873, and by virtue of s. 25, sub-s. 6, of that Act the covenant could, after an absolute assignment thereof in writing and due notice given, be sued upon by the assignee.

THIS was an action for an injunction to restrain the defendant from committing any breach of a covenant to buy beer, &c., from the plaintiffs under these circumstances.

(1) [This case is now reported in full on special representation of its importance to conveyancers.—F. P.]

On December 10, 1892, the defendant executed under seal an agreement with Broadbents, Limited, therein called "the landlords," to take the Midland Hotel at Withington as tenant from year to year from October 26, 1892, at the yearly rent of 400*l.*, subject to the tenancy being determined by a three months' notice on either side; and the defendant thereby agreed with the landlords (amongst other things) that he would at all times during the tenancy created purchase of the landlords, trading as Broadbents, Limited, and their successors in business, all beer, ale, porter, stout, mineral waters, and cigars sold and consumed either on or off the premises, and would not at any time directly or indirectly sell or dispose of on the demised premises any beer, ale, porter, stout, mineral waters, and cigars other than such as should have been so bonâ fide purchased; and there was a power for the "landlords, their successors or assigns," to re-enter on breach of any covenant by the lessee. Broadbents, Limited, who were the owners in fee of the Midland Hotel, did not execute the agreement of December 10, 1892, but the defendant occupied the hotel under that agreement as their tenant until they sold the premises to the plaintiffs. There was nothing on the face of the agreement to shew that Broadbents, Limited, were brewers, nor were there any words in it extending the phrase "the landlords" to the successors and assigns of Broadbents, Limited. They were, in fact, brewers and carried on their business at the Steam Brewery, York Street, in the city of Manchester.

By a contract dated March 29, 1899, Broadbents, Limited, agreed with the plaintiffs to sell to the plaintiffs their brewery and various tied houses (including the Midland Hotel), and also (clause 26) the goodwill of their business . . . . and all other the property, assets, and effects (except money and securities for money) belonging to them and used by them in connection with their said business. By two deeds, each dated June 24, 1899, the property comprised in the contract was conveyed to the plaintiffs; but there was no express conveyance of the goodwill or of the benefit of any tied house covenants; nor did the contract, nor the conveyance executed in pursuance thereof, contain any express reference to the defendant's

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tenancy, but the purchase and sale were necessarily subject thereto. On June 24, 1899, Broadbents, Limited, ceased to carry on business; and from that date the plaintiffs carried on the brewery formerly carried on by Broadbents, Limited, until Christmas at the Steam Brewery (Broadbents), when they transferred all the business to their own brewery in Ardwick Street, Manchester, which was about two miles from the Steam Brewery.

On June 28, 1899, the plaintiffs gave the defendant written notice that they had taken over the business of Broadbents, Limited, and subsequently he purchased beer, &c., from them. In October, 1899, the defendant being considerably in arrear with his payments, the plaintiffs refused to send him any more goods until he made a good payment. On the following November 13 the defendant complained for the first time of the plaintiffs' beer. On November 15 the plaintiffs put in a distress for arrears of rent, which the defendant paid out under protest. In December the defendant ceased to order goods of the plaintiffs; and in January, 1900, the plaintiffs issued the writ in this action, claiming an injunction to restrain the defendant from purchasing from firms or persons other than the plaintiffs any beer, &c., to be sold or consumed on or off the Midland Hotel in the occupation of the defendant as lessee thereof under the agreement of December 10, 1892, and from directly or indirectly selling or disposing of on the said premises any such goods as aforesaid not having been bonâ fide purchased from the plaintiffs.

The defendant by his statement of defence raised, substantially, three points: 1. That the plaintiffs supplied bad beer (which does not call for a report). 2. That the covenant in question was personal to the original landlords, Broadbents, Limited. 3. That the plaintiffs could not maintain any action on the covenant, because the original landlords, through whom they claimed as assigns, did not execute the agreement of December 10, 1892. This was the trial of the action.

*Carson, Q.C., Hughes, Q.C.*, and *O. L. Clare*, for the plaintiffs. The covenant in question is not a personal covenant,

but runs with the land, and the plaintiffs are the successors in business of Broadbents, Limited, and the owners of the reversion in fee of the Midland Hotel. They are, therefore, entitled to the benefit of the covenant, and can compel the defendant to take beer from them: *Clegg* v. *Hands* (1); *White* v. *Southend Hotel Co.* (2); *Fleetwood* v. *Hull* (3); *Friary, Holroyd, and Healey's Breweries* v. *Singleton.* (4) The fact that the word "assigns" is not mentioned in the covenant is not material here, because the covenant runs with the land: Conveyancing Act, 1881, s. 10. The defendant may rely on *Doe* v. *Reid* (5), but it is distinguishable. In that case the covenant was to buy beer brewed by the lessors at a particular place. It pointed to personal brewing.

*Younger, Q.C.*, and *G. Dodson*, for the defendant. The plaintiffs cannot maintain this action. First, because the covenant in question is personal to the original landlords and their successors in business, i.e., the defendant is only bound to take beer brewed at the Steam Brewery by Broadbents, Limited, or by their successors in business at that particular place: *Doe* v. *Reid* (5); *Birmingham Breweries, Limited* v. *Jameson.* (6) There is no mention of "assigns" in the covenant. In *Clegg* v. *Hands* (1) "assigns" were expressly mentioned. The plaintiffs are not the "successors in business" of Broadbents, Limited, for they are carrying on business at another place. Secondly, the right to sue on the covenant is claimed under the statute 32 Hen. 8, c. 34, which applies only to leases under seal: *Standen* v. *Chrismas* (7); *Cardwell* v. *Lucas.* (8) But Broadbents, Limited, did not execute the agreement. There is, therefore, no lease and no covenant that can be sued upon: *Soprani* v. *Skurro* (9); *Rose* v. *Poulton.* (10)

[FARWELL J. Is not *Morton* v. *Woods* (11) against you?]

That was a case of estoppel, and, it is submitted, does not

(1) 44 Ch. D. 503.
(2) [1897] 1 Ch. 767.
(3) (1889) 23 Q. B. D. 35.
(4) [1899] 2 Ch. 261.
(5) (1830) 10 B. & C. 849; 34 R. R. 584.
(6) (1898) 67 L. J. (Ch.) 403.
(7) (1847) 10 Q. B. 135.
(8) (1836) 2 M. & W. 111; 46 R. R. 509.
(9) (1602) Yelv. 18.
(10) (1831) 2 B. & Ad. 822; 36 R. R. 761.
(11) (1869) L. R. 4 Q. B. 293.

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apply. In order that the plaintiff can sue on the covenant there must be a lease under seal: *Swatman* v. *Ambler* (1); *Pitman* v. *Woodbury*. (2)

[FARWELL J. referred to the note to *Spencer's Case* (3), and to *Smith* v. *Eggington* (4) and *Cornish* v. *Stubbs*. (5)]

Further, s. 10 of the Conveyancing Act, 1881, applies to a "lease" only, and not to an "agreement for a lease"; and s. 5 of the Conveyancing Act, 1892, which extends the meaning of "lease" to an "agreement for a lease," applies only to s. 14 of the Act of 1881.

*Hughes, Q.C.*, in reply. The defendant is and has been in possession under the agreement, and the plaintiffs are entitled to compel him to accept a duly executed lease, and can then sue him on the covenant: *Walsh* v. *Lonsdale* (6); *Swain* v. *Ayres*. (7) [He also referred to ss. 10 and 58 of the Conveyancing Act, 1881.]

*Cur. adv. vult.*

1900. March 27. FARWELL J., after stating the facts and dealing at length with the evidence, held that there had been no breach by the plaintiffs of their obligation to supply good beer, and continued as follows:—The defence on the facts having failed, the defendant relies on two points of law. He contends that the agreement is a personal contract, and is confined to beer and ale brewed at the particular brewery, either by Broadbents, Limited, or by their successors, and he relies on the fact that there are no words referring to "assigns" in the covenant. The covenant is to purchase from the landlords, trading as Broadbents, Limited, and their successors in business, all beer, ale, porter, stout, mineral waters, and cigars. True it is that Broadbents, Limited, were brewers, but they were not manufacturers of mineral waters or cigars. There is nothing on the face of the agreement to shew that they were brewers; and, even if they were, there is nothing to shew that the beer, &c., to be taken by the defendant was beer to be brewed by them.

(1) (1852) 8 Ex. 72.
(2) (1848) 3 Ex. 4.
(3) (1582) Sm. L. C. 10th ed. vol. i. p. 60.
(4) (1874) L. R. 9 C. P. 145.
(5) (1870) L. R. 5 C. P. 334.
(6) 21 Ch. D. 9.
(7) (1888) 21 Q. B. D. 289.

In fact, part of the beer supplied to the defendant under the agreement, at his request, has been Bass. The question is one of construction: see *Clegg* v. *Hands* (1) and *White* v. *Southend Hotel Co.* (2). In the case of *Doe* v. *Reid* (3), relied on by the defendant, the form of covenant shewed that the beer to be taken was beer to be brewed by the covenantees (4); and the observation of Bayley J. (5) must be taken secundum subjectam materiam, and not as an enunciation of a general rule. *Birmingham Breweries, Limited* v. *Jameson* (6), the other case relied on by the defendant, is really in the plaintiffs' favour, for the Master of the Rolls expressly says that the difficulty in that case was created by the severance of the business from the reversion, and that when the business and the reversion remain together there is no difficulty. In the case before me the plaintiffs are undoubtedly the successors in business of Broadbents, Limited, and as such are within the very words of the covenant, and they are also the owners of the reversion. The defendant has in fact contracted to deal with the persons who purchase the business from Broadbents, Limited, not from persons who brew beer at the same brewery as Broadbents, Limited. On this point, therefore, the defendant also fails.

The last point taken by Mr. Younger rests on the fact that the agreement of December 10, 1892, was not executed by the landlords. Having regard to the construction that I have put on the covenant, it could not be contended that it is not of such a nature as to run with the land. But it is said that, in order to arrive at the conclusion that it does run with the land, the Court must first find that an estate has been duly created at law in the land with which the covenant can run, or, in other words, that there must be privity of estate between lessor and lessee, and that such estate can only be created by deed duly executed by the lessor, and that this is borne out by 32 Hen. 8, c. 34, which applies only to leases by deed. This is undoubtedly sound—e.g., it has been held that a lease by mortgagor and mortgagee, in which the covenants to repair were

(1) 44 Ch. D. 503, 520.
(2) [1897] 1 Ch. 767.
(3) 10 B. & C. 849; 34 R. R. 584.
(4) 10 B. & C. 851.
(5) Ibid. 857.
(6) 67 L. J. (Ch.) 403.

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with the mortgagor and his assigns, did not enable an assign of the mortgagee to maintain an action on the covenant: *Webb* v. *Russell*. (1) Lord Kenyon there says: "It is not sufficient that a covenant is concerning the land, but, in order to make it run with the land, there must be a privity of estate between the covenanting parties. But here" the mortgagor "had no interest in the land of which a Court of Law could take notice; though he had an equity of redemption, an interest which a Court of Equity would take notice of." And in *Standen* v. *Chrismas* (2) it was held that 32 Hen. 8, c. 34, applied to leases by deed only, and that when the lease was not under seal the assignee of the reversion could not maintain assumpsit on the contract against the lessee for failure to repair. The reason is obvious; if the contract was regarded as personal, the right to sue on it was not assignable at law; and, if it was not by deed, there was no estate in which the right to sue could be inherent. The law is stated with great lucidity by Wilde C.J. in *Bickford* v. *Parson* (3): "It was well said by Shepherd, arguendo, in *Webb* v. *Russell* (1), that 'there are three relations at common law, which may exist between the lessor and the lessee and their respective assignees; first, *privity of contract*, which is created by the contract itself, and subsists for ever between the lessor and lessee; secondly, *privity of estate*, which subsists between the lessee, or his assignee in possession of the estate, and the assignee of the reversioner; and, thirdly, *privity of contract and estate*, which both exist where the term and reversion remain in the original covenantors. The statute 32 Hen. 8, c. 34, seems to have created a fourth relation, *a privity of contract in respect of the estate*, as between the assignees of the reversion and the lessees or their assignees. The statute annexes, or rather creates, a privity of contract between those who have privity of estate; and, when the one fails, the other fails with it. At common law, the covenant did not pass by an assignment of the reversion, for, it was a mere personal contract.'" If, therefore, the plaintiffs had been suing in covenant or in assumpsit on con-

(1) (1789) 3 T. R. 393, 402; 1 R. R. 725.
(2) 10 Q. B. 135.
(3) (1848) 5 C. B. 920, 929.

tract before the Judicature Acts, I think they would have failed. But it by no means follows that the plaintiffs would have failed in every form of action, even before the Judicature Acts; still less that they must fail now. Before the Judicature Acts the plaintiffs might have succeeded if they had sued on the new contract implied from the conduct of the tenant and the assignee of the landlord, instead of suing on the original contract between the tenant and the landlord. I take the law as stated by Willes J. in *Cornish* v. *Stubbs* (1): "If the letting had been by deed, there would have been no doubt about the defendant being bound, because the statute of Hen. 8 would have passed the obligation of the contract to him as assignee of the reversion; and it has been established, and was laid down very clearly, though not, perhaps, for the first time, in *Buckworth* v. *Simpson* (2) that stipulations pass to successors in the case of yearly tenancies also, when rent has been paid either by the successor of the tenant to the landlord, or by the tenant to the successor of the landlord, and received without objection—that a jury, in fact, may infer from such payment, and from the fact of notice to quit not being given, a consent to go on, on the same terms as before; and a conventional law is thus made equivalent to that of Hen. 8, in the case of leases under seal. In this case, therefore, there was abundant evidence that the defendant was in the same position as his father would have been." In the case before me the defendant, on receiving the notice of June 28, 1899, writes on July 29: "This is the first official notice I have received of the change of landlords." From early in August the defendant carried on negotiations for three months or so with respect to the terms on which he should give up his tenancy; between August and November the plaintiffs' manager applied to him repeatedly for rent. On November 13 the defendant writes: "If it is a question of your rent, you can have it when you want"; and when a distress for rent was put in on November 15 the defendant paid it out; and, although he says it was under protest, this comes to nothing, for he was clearly liable, and he has recognised his liability by not bringing any action for illegal distress. I find,

(1) L. R. 5 C. P. 338–9. (2) (1835) 1 C. M. & R. 834; 40 R. R. 739.

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therefore, as a fact that the defendant agreed that the plaintiffs should occupy the position of landlords to him in the same way that Broadbents, Limited, had done.

There is, moreover, another point which is fatal to the defendant. The defendant holds under an agreement for a lease from Broadbents, Limited, under which he has been in possession and paid rent for several years. The whole contract has been performed up to the present time, except that the legal estate has not been actually demised. The defendant would have no defence to an action for specific performance, the sole object of which would be to compel him to accept the legal estate. If Broadbents, Limited, had not parted with the legal estate, I see no reason why they should not now execute the deed in order to complete the transaction. The present plaintiffs are the assigns of the benefit of the agreement both by implication from the conveyance of the land subject to the lease, and by the express words of clause 26 of the agreement of March 29, 1899. The plaintiffs could, therefore, obtain specific performance in this Court of the contract so far as it is incomplete. In saying this I do not forget that this is a yearly tenancy only, and that Wood V.-C. in *Clayton* v. *Illingworth* (1) refused to grant specific performance of a tenancy from year to year; but the reasons given by the Vice-Chancellor are inapplicable to the present case. He said there was nothing to shew in that case that there was to be any lease under seal at all; here the tenant executes under seal. He said that equity interposes to grant specific performance in cases where the legal remedy is inadequate, and that there was nothing in the case before him to shew why the remedy at law would not be adequate. Here the defendant's whole contention rests on the ground that the plaintiffs have no legal remedy, and the grant of specific performance is necessary to give them their full rights. It is well settled that the assign of one of the parties to a contract can obtain specific performance of that contract against the other contracting party; and, although it is usually necessary in such an action to make the assignor a party, I do not think that it is

(1) (1853) 10 Hare, 451.

essential in a case like the present, where the sub-contract is no longer in fieri, and there are no equities between the parties to the original contract, and no suggestion of any reason for making the original contractor a party. The managing director of Broadbents was called as a witness, and no question was put to him suggesting any reason for Broadbents, Limited, being made parties. Holding, therefore, as I do, that the plaintiffs could obtain specific performance against the defendant, I find it laid down by the Court of Appeal that since the Judicature Acts there are not in such a case as this two estates as there were formerly, one at common law by reason of the payment of the rent, and another in equity under the agreement, but the tenant holds under the same terms, and has the same rights and liabilities as if a lease had been granted: *Walsh* v. *Lonsdale* (1), approved by Cotton L.J. in *Lowther* v. *Heaver* (2), and explained by Lord Esher in *Swain* v. *Ayres* (3) and *Foster* v. *Reeves*. (4) Although it has been suggested that the decision in *Walsh* v. *Lonsdale* (1) takes away all differences between the legal and equitable estate, it, of course, does nothing of the sort, and the limits of its applicability are really somewhat narrow. It applies only to cases where there is a contract to transfer a legal title, and an act has to be justified or an action maintained by force of the legal title to which such contract relates. It involves two questions: (1.) Is there a contract of which specific performance can be obtained? (2.) If Yes, will the title acquired by such specific performance justify at law the act complained of, or support at law the action in question? It is to be treated as though before the Judicature Acts there had been, first, a suit in equity for specific performance, and then an action at law between the same parties; and the doctrine is applicable only in those cases where specific performance can be obtained between the same parties in the same court, and at the same time as the subsequent legal question falls to be determined. Thus, in *Walsh* v. *Lonsdale* (1), the landlord under an agreement for a lease for a term of seven years distrained. Distress is a legal

(1) 21 Ch. D. 9.
(2) (1889) 41 Ch. D. 248, 264.
(3) 21 Q. B. D. 289, 292.
(4) [1892] 2 Q. B. 255.

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remedy and depends on the existence at law of the relation of landlord and tenant; but the agreement between the same parties, if specifically enforced, created that relation. It was clear that such an agreement would be enforced in the same court and between the same parties: the act of distress was therefore held to be lawful. So in the present case I have already stated that specific performance can be granted between the parties to this action. I must treat it therefore as granted, and I then find that the result justifies this action. It is not necessary to call in aid this doctrine in matters that are purely equitable; its existence is due entirely to the divergence of legal and equitable rights between the same parties, nor does it affect the rights of third parties. Thus, a contract by a landowner to sell the fee simple of land in possession to A. would not enable A. to maintain an action of ejectment or trespass against a third person, because such actions are purely legal actions requiring the legal estate and possession respectively to support them, and the contract relied on is not made with the defendant. The case of *Friary, Holroyd, and Healey's Breweries* v. *Singleton* (1) turned on the construction of the word "assigns." In that case the plaintiffs had a contract to buy from the lessor a public-house subject to a lease which contained a covenant to sell the freehold at a certain price on six months' notice being given by the lessor, his executors, administrators, or assigns. The only notice given was given by the plaintiffs, and it was held that they were not assigns within the meaning of the clause. *Walsh* v. *Lonsdale* (2) was cited, but Romer L.J. held that it had no application. The real point was that the notice was given by the wrong person, that such notice was a condition precedent, and the objection would have been just as fatal if the action had been brought in the name of the original landlord. The reversal in the Court of Appeal turned on a question of fact only. I hold, therefore, on this point, that the plaintiffs, being clearly entitled in this Court against the defendant to specific performance of the agreement under which the defendant has been for years and still is in possession of the land, can sue him on the covenants in the same manner as they

(1) [1899] 1 Ch. 86; 2 Ch. 261. (2) 21 Ch. D. 9.

could have done if Broadbents had actually executed the original agreement. There are two other points to which I will refer, although I do not purpose to rest my decision on either of them. It is said that s. 10 of the Conveyancing Act enables the plaintiffs to sue. Unless they can do so on the ground last stated (as to which I would refer to *Swain* v. *Ayres* (1)), I should feel some difficulty in so holding. The word "lease" in s. 14 has been held not to include an agreement for a lease, and s. 18, sub-s. 17, expressly contrasts "lease" and "agreement for a lease." There are considerable difficulties in construing the section, and I express no final opinion upon it. The last point is this. The covenants in the original agreement by the defendant were personal contracts binding on him, on which he could have been sued at law in the name of Broadbents, Limited, after the assignment to the plaintiffs: see *Bickford* v. *Parson*. (2) Since the Judicature Act, 1875, the right to sue on those covenants is a chose in action within s. 25, sub-s. 6. The term "chose in action" in that section has been said in the Privy Council (*King* v. *Victoria Insurance Co.* (3)) to include all "rights the assignment of which a Court of Law or Equity would before the Act have considered lawful." I adopt this definition, and I hold that the benefit of these covenants could undoubtedly have been assigned in equity before the Act. The plaintiffs could therefore sue in respect of these covenants if there had been an absolute assignment thereof to them in writing signed by the assignor, of which express notice in writing had been given to the defendant. I express no further opinion on this, as it has not been argued, and it may be that no sufficient notice has been given.

The result is that I grant the injunction as asked, and order the defendant to pay the costs of the action.

Solicitors for plaintiffs: *Chester, Broome & Co., for Farrar & Co., Manchester.*

Solicitors for defendant: *Pritchard, Englefield & Co., for Mann & Rooke, Manchester.*

(1) 21 Q. B. D. 289. (2) 5 C. B. 920.

(3) [1896] A. C. 250, 254.

H. L. F.

FARWELL J.

1901

July 30.

## DODSON *v.* DOWNEY.

[1901 D. 246.]

*Partnership—Sale of Share—Vendor's Right to Indemnity—Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 31.

The purchaser of a share in a partnership must personally indemnify the vendor against the partnership liabilities.

ACTION.

This was a vendor's action for specific performance of a contract for the sale of his share in a partnership business.

About June, 1900, the vendor had arranged to retire from the business leaving his capital dormant for three years, but no deed of dissolution had yet been executed.

On September 19, 1900, after some preliminary correspondence, the purchaser, who was fully aware of the vendor's position in the business and of the above arrangement, wrote to the vendor's agents offering 175*l.* for his share.

On November 10, 1900, the vendor's agents, having communicated with their client in New Zealand, wrote accepting the offer, adding, "The arrangement had, we should think, better be carried out by a partnership deed providing for Mr. Cyril Dodson's retirement and for your joining the firm and taking over his position and indemnifying him against all liability and claims in connection with the business." It was subsequently found that the vendor's partners were not willing to accept the purchaser as a partner, so that his rights on completion would be merely those of an assignee under the Partnership Act, 1890, s. 31. The purchaser having repudiated the contract, the vendor sued for specific performance.

The purchaser objected that there was no complete contract, on the ground (inter alia) that the indemnity mentioned in the acceptance was a new term not included in the offer, and not implied on a contract to sell a share in a partnership business.

The case was tried on the pleadings and correspondence, no evidence being given on either side.

*Upjohn, K.C.*, and *R. B. Yardley*, for the vendor. The proposed indemnity is not a new term. The purchaser of a share in a partnership takes it subject to the partnership liabilities: *Kelly* v. *Hutton* (1); *Whetham* v. *Davey* (2); and must, therefore, indemnify his vendor: *Waring* v. *Ward* (3); *Bridgman* v. *Daw*. (4)

*Phipson Beale, K.C.*, and *S. R. Earle*, for the purchaser. The doctrine of *Waring* v. *Ward* (3) has never been applied to the case of the sale of a share in a partnership. (5)

[FARWELL J. Surely Lord Eldon's reasoning would cover it.]

If the purchaser were becoming a partner in the vendor's place, that might be so. He would then have complete control over the share, and a voice as to the incurring of liabilities. As a mere assignee he has no right of control; but, on the other hand, he is entitled to receive his assignor's share of profits, or his share of the assets on dissolution: Partnership Act, 1890, s. 31. (6) He does not buy the liabilities. The contrary view in effect makes him a partner without right of control.

(1) (1868) L. R. 3 Ch. 703, 709.

(2) (1885) 30 Ch. D. 574, 580.

(3) (1802) 7 Ves. 332, 337; 5 R. R. 134, n.

(4) (1892) 40 W. R. 253.

(5) The Index to the Revised Reports, vols. i. to xl. p. 737, contains the following observations on *Waring* v. *Ward*, 7 Ves. 332, 337; 5 R. R. 134, n.:—

"Attention has been called to the omission of the report of *Waring* v. *Ward* on appeal, 7 Ves. 332 (noted 5 R. R. 134). The case has been supposed to deal with the obligation of a purchaser of an equity of redemption to indemnify a vendor against the mortgage debt. But that, it is submitted, is not the case. Lord Eldon, at p. 336 [*sic*], says: 'If he (the purchaser) enters into no obligation with the party from whom he purchases, neither by bond nor covenant of indemnity to save him harmless from the mortgage, yet this Court, if he receives possession, and has the profits, would, independent of contract, raise upon his conscience an obligation to indemnify the vendor against the personal obligation to pay the money due upon the vendor's transaction of mortgage; for, having become the owner of the estate, he must be supposed to intend to indemnify the vendor against the mortgage.' Such obligation, according to modern ideas, rests, not upon conscience, but upon an implied contract. A mere reference to an elementary and unquestioned proposition can scarcely justify the retention of a case which is otherwise obsolete."

(6) The Partnership Act, 1890, provides as follows:—

Sect. 31: "(1.) An assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration

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[FARWELL J. He does not become liable to the other partners, but surely he must indemnify his vendor, who is a trustee for him: *Rose* v. *Watson*. (1)]

There is no decision to that effect, and it is not suggested in *Lysaght* v. *Edwards* (2), where the vendor's position as trustee is very fully discussed.

FARWELL J. The purchaser's last objection raises the question, What is the position of a purchaser of a share in a partnership business? Assuming, as stated in the pleadings and correspondence, that the vendor had severed his connection with the business, and had made this arrangement for leaving his money dormant for three years, he still had certain rights, as a partner, or a late partner, including the right to have his capital repaid, subject to that arrangement. I cannot follow the purchaser's argument on s. 31 of the Partnership Act, 1890. That section in my opinion is primarily intended for the protection of the vendor's partners. It is also intended to declare that a partner may sell or mortgage his share in a partnership, provided that he does not interfere with his partners' rights. They are not bound to accept or acknowledge the purchaser at all; but the vendor, as between himself and his partners, may sell everything he has to sell. The purchaser of a share in such a business differs in no way that I can see from the purchaser of any other property. As from the date of the contract he becomes the owner of the property, subject only to the liability to pay the purchase-money, and the vendor becomes a trustee with certain qualifications, as is correctly stated in Dart on Vendors and Purchasers, 6th ed. p. 283: "The vendor is not a mere dormant trustee; he is a trustee

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of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners.

(2.) In case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution."

(1) (1864) 10 H. L. C. 672, 683.

(2) (1876) 2 Ch. D. 499.

having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest, if anything should be done in derogation of it. The relation, therefore, of trustee and cestui que trust subsists, but subject to the paramount right of the vendor to protect his own interest as vendor of the property. When the title has been accepted and the purchase-money paid, this paramount right of the vendor ceases, and the trusteeship subsists without any qualification; but as from the date of the contract the relationship is throughout that of trustee and cestui que trust."

It appears to me to follow from that statement that the purchaser as cestui que trust is personally bound to indemnify the vendor as trustee from the liabilities of the trust property. (1) He buys the share and steps into the position of the vendor.

The purchaser contends that he takes the benefits and not the liabilities. Suppose a man buys a share in a partnership, and it goes on for six years, during which time the vendor remains as the nominal partner. The first four years are successful, and the purchaser takes all the profits. At the end of that time there are two disastrous years, in which the liabilities exceed the assets. The purchaser contends that the vendor must bear the loss; such a proposition is in my opinion absolutely untenable.

Applying the principle which seems to me to be correctly stated in the passage I have read from Dart, as soon as the relation of trustee and cestui que trust is established all the incidents follow, including the vendor's right to a personal indemnity.

The result is that I make a decree for specific performance, and the purchaser must pay the costs of the action. By analogy to the case of *Bridgman* v. *Daw* (2), the assignment will contain an express covenant by the purchaser to indemnify the vendor against the liabilities of the business.

Solicitors: *Alexander Neale, for Bennett & Marsh, Worthing; Edward Betteley.*

(1) Vide *Hardoon* v. *Belilios*, [1901] A. C. 118. (2) 40 W. R. 253.

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## GREAT WESTERN RAILWAY COMPANY *v.* BLADES.

[1900 G. 1818.]

*Mines and other Minerals—Clay—Railway Company—Purchase of Surface—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 77, 78.

The principles governing cases like *Hext* v. *Gill*, (1872) L. R. 7 Ch. 699, which deal with a reservation of minerals by virtue of a grant or contract, are not applicable to the determination of cases arising out of a statutory reservation of minerals, like that contained in s. 77 of the Railways Clauses Consolidation Act, 1845.

Though a mineral primâ facie includes anything lying under the land which has a value of its own as being capable of being used independently of the land, yet that rule may be modified by the circumstances of the case where the mineral in question is excepted only by virtue of a statutory reservation. Clay forming the surface or subsoil and constituting "the land" purchased for the purposes of the undertaking is not a "mineral" within s. 77 of the Railways Clauses Consolidation Act, 1845, as interpreted by *Lord Provost and Magistrates of Glasgow* v. *Farie*, (1888) 13 App. Cas. 657.

*Semble:* The same clay may be a mineral in one district and not in another.

ACTION.

The only question raised by this action was, whether the clay under a piece of land at West Bromwich, purchased by a railway company for the purposes of its undertaking, was a "mineral" excepted from the conveyance by virtue of s. 77 of the Railways Clauses Consolidation Act, 1845. The main facts were admitted, and were shortly as follows :—

By an indenture of August 26, 1852, made between the predecessors in title of the defendants, therein described as coal and iron masters, of the one part, and the Birmingham, Wolverhampton and Dudley Railway Company of the other part, after reciting that the company in pursuance of the powers reposed in them by their Act had contracted for the purchase, for the purposes of the said Act, of the pieces of land and hereditaments thereinafter described, and the inheritance thereof in fee simple in possession for the sum of 5500*l.*, to include "compensation for the costs of sinking a new coal-pit,

and the cost of a new Whimsey engine and plant for working the unwrought mines of the parties hereto of the first part," and for severance and injury done to the adjoining lands, some six acres of land, part of Swan Farm, West Bromwich, in the county of Stafford, were conveyed to the railway company, without any further reference to mines or minerals, for the purposes of their Act, which incorporated the Lands Clauses and the Railways Clauses Consolidation Acts, 1845. The railway was carried over the land so purchased on a high embankment, along the top of which the permanent way was laid. The undertaking and powers of the Birmingham, Wolverhampton and Dudley Railway Company were transferred to and vested in the plaintiff company, the Great Western Railway Company, as from April, 1853. The defendants were the owners of the lands adjoining that part of Swan Farm that was conveyed in 1852, and also of the minerals under the land so conveyed, and had recently commenced to excavate, and work by open workings, the subsoil and clay in their adjoining lands, and, having now reached the boundary of the plaintiffs' embankment, had given the plaintiff company a proper notice of their intention to work the minerals under the railway pursuant to s. 78 of the Railways Clauses Act. The plaintiff company did not within the thirty days allowed them state their willingness to make compensation, and thereupon the defendants threatened and intended to work the clay, and to enter and dig out and remove the same from the plaintiffs' land. The plaintiff company accordingly commenced the present action, and claimed an injunction to restrain the defendants from excavating the soil and clay in any manner likely to let down or injure the railway.

The action was tried with witnesses, and the result of their evidence as to the nature and quality of the clay was found by the Court as follows: The land in question lay within the district of the South Staffordshire blue brick clays, upon the top was a layer of vegetable or windblown deposit, made up of decomposed vegetable matter or ordinary surface soil, of a depth varying from nothing to about 2 feet. Speaking generally, its average thickness might be taken at from 6 inches

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to a foot. Immediately below this came the South Staffordshire clay. The uppermost 5 feet, or thereabouts, of this clay had become partially decomposed by exposure to weather, percolation of water, and the like, and was called by the witnesses "weathered"; below this came the unweathered or virgin South Staffordshire blue brick clay. Subject to some trifling strata of sandstone which lay within it, this clay extended to a considerable depth, some 300 or 400 feet or more. The top 5 feet of weathered clay was good for making ordinary red bricks, but would not, without admixture with other clay, make Staffordshire blue bricks: in working, it was usually ground up and mixed with the virgin clay of a lower stratum, and from this mixture the Staffordshire blue bricks were made. The clay was admittedly of a valuable kind: the defendants alleged that it made the best blue bricks in the neighbourhood.

*Neville, K.C., Asquith, K.C.*, and *R. J. Parker*, for the plaintiff company. The present case is entirely within the decision of *Lord Provost and Magistrates of Glasgow* v. *Farie* (1): true, that was a decision under s. 18 of the Waterworks Clauses Act, 1847; but the wording of that section and s. 77 of the Railways Clauses Consolidation Act, 1845, are identical. The clay in this case is practically "the land" on which the railway runs. The surface minerals must either add to the value of the land at the time of purchase or not; if they do not add to the value, why is the railway paying the full value of the land not to have the surface minerals? If they do add to the value of the lands, why should not the landowner be paid for them at the time? In the present case the railway paid 5500*l.* for six acres of land. True, some part of this was for compensation for a new coal shaft; but it cannot be supposed this large sum was paid for a mere easement over the surface, a defeasible right of way. Lord Macnaghten's judgment in *Lord Provost and Magistrates of Glasgow* v. *Farie* (2) is directly applicable to the present case. The *Midland Ry. Co.* v. *Robinson* (3) does not touch the principle

(1) 13 App. Cas. 657. (2) 13 App. Cas. 697, 698.
(3) (1889) 15 App. Cas. 19.

of *Lord Provost and Magistrates of Glasgow* v. *Farie* (1): the only question there was whether the coal and limestone, which were wrought by open workings, were mines of minerals; and that case decided that "mines" included open as well as subterraneous workings. *Midland Ry. Co.* v. *Haunchwood Brick and Tile Co.* (2) did not decide that "clay" was a mineral. It was assumed that clay was a mineral for the purposes of that case, the point being, whether it was a mine of a mineral; besides, it was prior to the decision in *Lord Provost and Magistrates of Glasgow* v. *Farie*. (1) The fact that the conveyance speaks of mines in connection with coal only, is of some assistance in determining whether clay was intended to be included in the conveyance or not. The reference to the "unwrought mines" of the vendors did not include clay: until after *Midland Ry. Co.* v. *Haunchwood Brick and Tile Co.* (2) clay was not considered or claimed as a mineral; so that in 1852 there was no idea of reserving clay. Some weight should also be attributed to the amount of the purchase-money in ascertaining what the railway really bought: here the clay is the surface, "the land" purchased: there is nothing but clay; the claim of the defendants amounts to a claim to be paid twice over.

*Warmington, K.C.*, and *J. W. M. Holmes*, for the defendants. *Lord Provost and Magistrates of Glasgow* v. *Farie* (1) is the only case cited by the plaintiffs which is in favour of their contention; but that case has not been regarded as an authority upon the English statute. The circumstances under which the conveyance was executed in that case were considered important by Fry L.J. in *Earl of Jersey* v. *Neath Poor Law Union*. (3) The Lord Chancellor in commencing his judgment in *Lord Provost and Magistrates of Glasgow* v. *Farie* (1) expressly confines himself to the particular case before him under the Waterworks Clauses Act, 1847. In that case, too, the matter under discussion was clay under a reservoir, where the substratum of clay was all-important; and the words in question had to be construed with reference to the known

(1) 13 App. Cas. 657. (2) (1882) 20 Ch. D. 552.
(3) (1889) 22 Q. B. D. 555, 564, 565.

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usage of the language employed in distinguishing proprietary rights in Scotland, having relation to Scottish land and Scottish mines and minerals: see per Lord Halsbury. (1) That decision is, therefore, not binding in a case where an English statute has to be considered. Lord Herschell's judgment is in favour of our contention that this clay is a mineral, and he makes no reservation between Scottish and English minerals or lands.

*Errington* v. *Metropolitan District Ry. Co.* (2) shews that railways can subsequently acquire the gravel and clay underneath their lines, and is an instance of a railway company's own views of what are mines and minerals. The judgment of Fry J. in *Loosemore* v. *Tiverton and North Devon Ry. Co.* (3) (which, though reversed on appeal, was restored on this point by the House of Lords (4)) involves the question that clay is a mineral, and is in our favour. *Midland Ry. Co.* v. *Haunchwood Brick and Tile Co.* (5) involves the decision that clay is a mineral, as does *Midland Ry. Co.* v. *Miles.* (6) Then there is *Earl of Jersey* v. *Neath Poor Law Union* (7), which, though a decision on the construction of a grant, is valuable for the observations on *Hext* v. *Gill* (8) and *Lord Provost and Magistrates of Glasgow* v. *Farie* (9), and the result of this decision appears to be this: the question the Court has to decide in these cases is whether the thing the landowner proposes to work, whether by open or underground workings, is a substance which has a value of its own independent of its being a constituent part of the soil; if so, it is a mineral, and must be paid for. In construing a Waterworks Act the Court might well have taken into consideration the fact that the area of a reservoir is much less than a railway, and that clay is the most suitable substratum for an undertaking of that kind. [*Ruabon Brick and Terra Cotta Co.* v. *Great Western Ry. Co.* (10) and *Johnstone* v.

(1) 13 App. Cas. at p. 671.
(2) (1882) 19 Ch. D. 559.
(3) (1882) 22 Ch. D. 25.
(4) (1884) 9 App. Cas. 480.
(5) 20 Ch. D. 552.
(6) (1885) 30 Ch. D. 634; (1886) 33 Ch. D. 632.
(7) 22 Q. B. D. 564.
(8) L. R. 7 Ch. 699.
(9) 13 App. Cas. 657.
(10) [1893] 1 Ch. 427.

*Crompton & Co.* (1) were also referred to.] Here, therefore, are a series of authorities on the construction of the English Act which all recognise the principle that merchantable clay is a mineral, to which a railway company is not entitled as part of the land purchased, unless it has been expressly conveyed to it, and that there is no difference whether the clay is actually on the surface or not. The defendants are, therefore, entitled to work this clay, or be compensated for not working it.

*Neville, K.C.*, in reply. The consideration of what is the meaning of mines or minerals in a grant is not of much assistance in coming to a conclusion as to what was intended to be reserved by the statute in a reservation of mines and other minerals: this seems clear from *Lord Provost and Magistrates of Glasgow* v. *Farie* (2) and *Midland Ry. Co.* v. *Robinson*. (3) The principles of cases like *Hext* v. *Gill* (4) do not, therefore, apply. It is stated by Lord Watson in *Farie's Case* (5) that the Legislature intended the words "mines of coal, ironstone, slate, or other minerals" to have the same meaning in all three countries. No distinction can be drawn between the clay in *Farie's Case* (2) and the clay in this. The defendants have failed to distinguish this case from *Farie's Case* (2), to shew that that case is not binding on this Court, or to establish the proposition that clay of this character, which the witnesses say is the substance of the land itself, was reserved by the operation of s. 77 of the Railways Clauses Consolidation Act, 1845.

*Cur. adv. vult.*

July 20. BUCKLEY J. The decision in this case affects interests of far-reaching importance. It involves or may involve the determination, as between the railway companies of this country on the one hand and the landowners from whom they purchased the soil on which their lines are laid on the other, of the question whether the clays which in many cases constitute or more or less closely underlie the soil have passed to

(1) [1899] 2 Ch. 190.
(2) 13 App. Cas. 657.
(3) 15 App. Cas. 19.
(4) L. R. 7 Ch. 699.
(5) 13 App. Cas. 674.

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the companies by the conveyance of the land, or are, by virtue of s. 77 of the Railways Clauses Act, 1845, excepted. If they are excepted the landowner is entitled to get them, even by surface workings and destruction of the surface, unless the company, upon notice given, elect to purchase. In substance, therefore, the question is whether the value of these clays, or many of these clays (and it must be many millions sterling), belongs to the railway companies or to the vendors of lands to them.

Sect. 77 of the Railways Clauses Act, 1845, excepts from conveyances of lands made under a statutory purchase "mines of coal, ironstone, slate, or other minerals." The question I have to determine is whether such clay as I shall have to describe in the present case is a "mineral." If it be, then an open working of that mineral from the surface, according to the usual manner of working in the district, is a "mine of the mineral": *Midland Ry. Co.* v. *Robinson*. (1) A purchaser of the surface is by the common law entitled to support from the subjacent and adjacent strata. But, in cases falling within the fasciculus of clauses of the Railways Clauses Act, 1845, commencing with s. 77, the statute has created a specific law, and by that alone are the rights of the purchasing company and the owner of the minerals regulated: *Great Western Ry. Co.* v. *Bennett*. (2) It was decided in that case "that the common law principle which would have prevented an owner who had sold his surface land to a railway company from defeating his grant by withdrawing support from the surface land so used, did not apply to a state of things created by the statute in which the statute itself creates the distinction between the surface-owner and the mine-owner, and gives power to the mine-owner to work his minerals unless the railway company purchases or gives compensation to the mine-owner for leaving his mines unworked": per Lord Halsbury in *Lord Provost and Magistrates of Glasgow* v. *Farie*. (3)

The statutory law, as regards mines of minerals, which by s. 77 are excepted from the conveyance, is that the company,

(1) 15 App. Cas. 19. (2) (1867) L. R. 2 H. L. 27.
(3) 13 App. Cas. 671.

until the mine-owner is minded to work, enjoys support, and that when the mine-owner is minded to work he must give notice, and the company may, if so minded, purchase the minerals. But if after notice the company does not purchase, then the mine-owner may get the minerals, even though by so doing he lets down and destroys the surface; and this is not confined to subterranean workings, but extends also to open workings from the surface itself.

In *Hext* v. *Gill* (1) the result of the authorities was stated by Mellish L.J. to be that "a reservation of 'minerals' includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the Court to give it a more limited meaning." Notwithstanding what has been said in a recent decision in the House of Lords in *Lord Provost and Magistrates of Glasgow* v. *Farie* (2), to which I shall presently more particularly refer, it must be taken as concluded before me by the decision of the Appeal Court in *Earl of Jersey* v. *Neath Poor Law Union* (3), that *Hext* v. *Gill* (4) has not been overruled, and that that case, where applicable, is as absolutely binding upon me as before *Lord Provost and Magistrates of Glasgow* v. *Farie* (2) was decided. The real question for my decision, I apprehend, is whether to the transaction with which I have to deal the rule in *Hext* v. *Gill* (4) is applicable or not.

The task before me is limited, I think, to ascertaining the exact facts of the case with which I have to deal, and then endeavouring not so much to put a construction upon s. 77 of the Railways Clauses Act, 1845, for myself as to endeavour to understand and state the true effect of the many decisions upon that section. They are not all of them easy to reconcile, and the more so in that they include differences of opinion upon cardinal points as between the learned Lords and learned judges of appeal who have taken part in their decision. [Having shortly stated the conveyance of 1852, his Lordship continued:—]

(1) L. R. 7 Ch. 712.
(2) 13 App. Cas. 657.
(3) 22 Q. B. D. 555.
(4) L. R. 7 Ch. 699.

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I am unable to accede to an argument advanced by the plaintiffs that the fact that this deed speaks of mines in connection with coal assists me at all in determining whether in this transaction clay is a mineral or not. The fact that the word "mines" in the language of this deed includes coal does not shew that it excludes clay. Neither can I accede to an argument of the plaintiffs that, for the purpose of ascertaining what were the parcels as described in this deed, I can have regard to the fact that a large sum per acre (even allowing for the compensation which I have referred to) was evidently paid. For the purpose of this decision I regard the conveyance of 1852 as being nothing but a conveyance of six acres of land (of the nature proved by the evidence) made under the statute, with all the consequences which ensue from a conveyance of that kind by the operation of s. 77. [Having stated the result of the evidence as to the nature of the land, and the facts leading up to the commencement of this action, his Lordship continued:—]

The whole question, therefore, is whether this clay is a mineral which, by virtue of s. 77 of the Railways Clauses Act, 1845, was excepted from the conveyance of August 26, 1852; whether in fact it now belongs to the defendants, or whether it passed by the conveyance and now belongs to the plaintiffs.

After carefully considering all the authorities I have come to the conclusion that the proposition which lies at the root of the true solution of the question is that, to a case dependent as this is upon the operation of the statute, different considerations apply from those which arise in a case where the relations between the parties exist by contract or grant. The difference lies in the fact that where by way of grant land passes from A. to B., reserving the minerals to A., he, A., cannot so work the reserved minerals as to let down the surface, for that would be to destroy that which he has granted. In this case, therefore, there is no reason for withholding from the word "minerals" the widest meaning, because, be the meaning as wide as you will, the rights of B. are not affected seeing that A. cannot work the reserved thing so as to injure B. But where the case is one under this Act of Parliament, that proposition is not

true; for A. can work the excepted thing so as to injure B., and the whole basis of *Lord Provost and Magistrates of Glasgow* v. *Farie* (1), in arriving at the decision at which the House of Lords there arrived (without overruling—as the Court of Appeal have distinctly said their Lordships did not overrule—*Hext* v. *Gill* (2)), seems to me to lie in that proposition.

I find that this difference in the considerations applicable to the two cases has been repeatedly pointed out in the House of Lords. Thus, in *Great Western Ry. Co.* v. *Bennett* (3), which may be said to be the foundation of all this branch of the law, Lord Westbury (4), after reading s. 77, says: "In the face of these words there is no room for the ordinary implication which applies to a common grant, namely, that it extends by implication to all that, though not named, which is necessary for the support or enjoyment of the thing granted." Lord Watson, in *Lord Provost and Magistrates of Glasgow* v. *Farie* (5), speaking of *Menzies* v. *Earl of Breadalbane* (6), which was a case of contract, says: "Irrespective of other considerations which differentiate that case from the present, there is little analogy between a reservation of minerals coupled with an obligation to support the surface, and a reservation not only of the minerals, but of the right to work them without giving support." In the same case Lord Herschell (7), after pointing to similar considerations, says: "In this respect the case differs from an ordinary reservation in a deed unaffected by statutory provisions." Lord Herschell, again, in *Midland Ry. Co.* v. *Robinson* (8), says: "I doubt whether much assistance is to be obtained from the cases in which a construction has been put upon that word" (mines) "in instruments embodying merely agreements between the parties to them, unaffected by any statutory enactment. In such agreements, in the absence of a distinct indication of the contrary intention, it is always to be assumed that the reserved mines are only to be worked

(1) 13 App. Cas. 657.
(2) L. R. 7 Ch. 699.
(3) L. R. 2 H. L. 27.
(4) Ibid. 41.
(5) 13 App. Cas. 674.
(6) (1822) 1 Sh. App. 225.
(7) 13 App. Cas. 684.
(8) 15 App. Cas. 19, 27.

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in such a manner as is consistent with the surface remaining undisturbed. And if this be true of minerals lying deep below the surface, it would be obviously out of the question to permit it to be disturbed by winning minerals which can only be wrought by surface operations. But in the case of mines reserved under s. 77 of the Railways Clauses Act the case is different. It is clear that the mines reserved, if not purchased by the company, may be so worked as to interfere with the surface, the only limitation being that the working must be according to the usual manner of working such mines in the district where the same are situate."

It will occur to every one that an argument might be advanced to the contrary of this of the following nature: In more than one of the cases the reasoning is adopted by the judges that the word "mines" in s. 77 may very properly have attributed to it the widest possible meaning, because the railway companies are not necessarily injured, seeing that they can protect themselves by purchasing. (See e.g., *Midland Ry. Co.* v. *Haunchwood Brick and Tile Co.* (1); *Midland Ry. Co.* v. *Robinson.* (2)) A similar argument might be employed for the purpose of shewing that "minerals" might, without injury to the railway companies, receive the widest possible meaning for the like reason. But though I have looked diligently to see whether any of the learned Lords who have dealt with this matter have accepted this argument, I cannot find that they have. On the contrary, from the passages which I have quoted, I am satisfied that the decisions include this as a proposition upon which I am entitled and bound to act, and which I think explains *Lord Provost and Magistrates of Glasgow* v. *Farie* (3) consistently with all the other cases—namely, that you are not to apply to a case where there is no right to support under the Act the considerations which you are to apply where there is a right to support because the rights lie in contract.

The authority upon which the plaintiffs mainly rely, and which, in my opinion, governs the present case, is the decision

(1) 20 Ch. D. 552, 556. (2) 15 App. Cas. 19, 28.
(3) 13 App. Cas. 657.

of the House of Lords in *Lord Provost and Magistrates of Glasgow* v. *Farie*. (1) The defendants argued that the facts stated in the report at pages 659 to 661 from the pleadings, and the fact that the purchasers there were a waterworks company, to whom from the nature of the case the clayey nature of the soil would be of importance for the purpose of retaining water, were circumstances which swayed the judgment of the House. I cannot accede to this argument.

I cannot in the judgments find a trace that any of their Lordships proceeded upon anything arising from those facts, or from the fact that the appellants' works were waterworks. No evidence was given in the case, and Lord Watson pointed out (2) that the statements in the pleadings were unfortunately conflicting. The case was one of conveyance it is true, but of conveyance by reference to the statute, and the learned Lords dealt with it entirely as a case under the statute.

Thus Lord Halsbury (3) says that the question is whether clay is included in the reservation of mines and minerals under the Waterworks Clauses Act, 1847. Lord Herschell (4) says the issue depends entirely upon the construction to be put upon the statute in relation to the circumstances before the House, and Lord Macnaghten (5) says that the question must depend for its solution on an examination of the sections in the Waterworks Act which bear upon the subject, with the aid of such light as may be derived from parallel passages in the Railway Acts. The defendants also urged that Lord Halsbury strictly limited his opinion to the case then before the House, and left himself wholly free if the question should arise with respect to any other statute, or with respect to any grant not controlled by the statute relevant in that case. But I cannot accede to the argument that by that observation the decision was, even so far as Lord Halsbury was concerned, confined to Scotland or to the Waterworks Clauses Act, 1847. Lord Halsbury dealt with it as a case depending on certain language in a statute, and identical language is found in this

(1) 13 App. Cas. 657.
(2) Ibid. 674.
(3) 13 App. Cas. 669.
(4) Ibid. 680.
(5) 13 App. Cas. 686.

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statute. Lord Watson said (1) that the question would be precisely the same if the purchaser had been a railway company and the statute an English statute. Lord Herschell (2) pointed attention to other statutes which contained the same words, and said that it was not to be supposed that the Legislature intended the same enactments in various statutes to have a different meaning, and Lord Macnaghten (3) called attention to the fact that the words of the Railways Clauses Act, 1845, are in this respect identical. The question the House determined, in my opinion, was this—that under the statute which was relevant there, and which is in identical words here, cases such as *Hext* v. *Gill* (4) dealing with grants are not of much assistance, and that, while the rule in *Hext* v. *Gill* (4) is no doubt good law in circumstances to which it applies, the question under an Act such as this involves other considerations. I am fortified in my view of the effect of the several decisions upon this vexed point by reading *Earl of Jersey* v. *Neath Poor Law Union*. (5) The judgments in that case shew me, as I think, that the true principle to apply is that, accepting the decision in *Hext* v. *Gill* (4) as being good law, and assuming that a mineral primâ facie includes anything lying in the land which has a value of its own as being capable of being used independently of the land, yet that that rule must bend, as Bowen L.J. said (6), or may be modified as Fry L.J. said (7), by the circumstances of the case, and that what I must look to is to see whether in the nature of this transaction, and having regard to all the circumstances of this case, the word "minerals" does in the case now before me extend to include the clay in question.

I must also look to this, as Fry L.J. says in *Earl of Jersey* v. *Neath Poor Law Union* (8): "that in the construction of a statutory enactment intended to regulate the relative rights of a body of persons purchasing an interest in land for the purpose of constructing works, and the previous owner, it is reasonable to anticipate that the purchasers would acquire

(1) 13 App. Cas. 673, 674.
(2) Ibid. 682.
(3) Ibid. 686.
(4) L. R. 7 Ch. 699.
(5) 22 Q. B. D. 555.
(6) Ibid. 562.
(7) Ibid. 565.
(8) Ibid. 564.

such an interest in the surface as would enable the works to be constructed and maintained by the purchasers."

I wish it were open to me to adopt that which James L.J. in *Hext* v. *Gill* (1) said, but for the authorities, he would have thought was the right way to ascertain the meaning, and which Lord Halsbury in *Lord Provost and Magistrates of Glasgow* v. *Farie* (2) would evidently have desired himself to adopt, and to say that the meaning of the word is mere question of fact, to be determined like any other question of fact; but I do not feel that the authorities leave me at liberty to do this. It seems to me that I must ascertain the meaning upon the footing that mineral may, as in *Hext* v. *Gill* (1) and in *Midland Ry. Co.* v. *Haunchwood Brick and Tile Co.* (3), include clay, but not that it must include clay, and that the question whether it does or does not is to be determined by ascertaining the true nature of the transaction and the object of the contracting parties. This, I think, is the fair result of *Lord Provost and Magistrates of Glasgow* v. *Farie* (2) and *Earl of Jersey* v. *Neath Poor Law Union.* (4) Mines and minerals, as Lord Watson says (5), are not definite terms; they are susceptible of limitation or expansion according to the intention with which they are used.

In this state of things I do not find much assistance from that which was said by Sir George Jessel in *Errington* v. *Metropolitan District Ry. Co.* (6), or by Fry J. in *Loosemore* v. *Tiverton and North Devon Ry. Co.* (7), or from *Midland Ry. Co.* v. *Miles* (8), where I find (9) that the company did not argue that clay was not a mineral, or, as Lord Watson said in *Lord Provost and Magistrates of Glasgow* v. *Farie* (2), even from *Hext* v. *Gill.* (1) As regards *Midland Ry. Co.* v. *Haunchwood Brick and Tile Co.* (3), I may say that the decision, as I read the case, was not really one that clay was a mineral, although that was involved in the decision, but was that surface workings of clay (assuming clay to be a mineral) were

(1) L. R. 7 Ch. 699.
(2) 13 App. Cas. 657.
(3) 20 Ch. D. 552.
(4) 22 Q. B. D. 555.
(5) 13 App. Cas. 675.
(6) 19 Ch. D. 559, 571.
(7) 22 Ch. D. 25, 42.
(8) 30 Ch. D. 634; 33 Ch. D. 632.
(9) 33 Ch. D. 634.

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mines of that mineral. *Ruabon Brick and Terra Cotta Co.* v. *Great Western Ry. Co.* (1) is but an application of *Midland Ry. Co.* v. *Robinson* (2) to its own peculiar facts.

It remains to solve the question, therefore, upon the facts of this particular case. Now the facts here, concisely stated, seem to me to be that this clay is the soil. The six inches or so of decomposed vegetable matter on the surface is not in this place the soil any more than in a room the carpet can be said to be the floor. The plaintiffs' witnesses (I may instance Professor Lapworth and Mr. Whitaker as instances, but in fact they all say the same thing) say that these clays are in this district the land, and the figures which the defendants' witnesses give in stating the different strata of the ground lead irresistibly to the same conclusion. It is impossible to read the speeches in *Lord Provost and Magistrates of Glasgow* v. *Farie* (3) without seeing that it may well be, consistently with that decision, that the same clay may within that decision be a mineral in one district and not in another. Thus Lord Watson (4), after suggesting that it may be possible that there may be some strata which would pass to the compulsory purchaser if they lay on the surface, but be reserved if they occurred some depth below it, goes on to say that the expression "the land," being that which the company purchases, cannot be restricted to vegetable mould or to cultivated clay, but that it naturally includes and must be held to include the upper soil, including the subsoil, whether it be clay, sand, or gravel. And Lord Macnaghten (5) points to similar considerations as affording an answer to the question of what it is that the company have bought. Where the clay is what Lord Halsbury calls the stratum on which the house is built (6), or constitutes "the land," as Lord Watson describes it (4), it is not, I think, a "mineral" within the Act as the Act has been construed by the decisions. It is a thing which has a value of its own, but not a thing which has a value of its own apart from the soil in which it is found, for the simple reason that it is itself the soil.

(1) [1893] 1 Ch. 427.
(2) 15 App. Cas. 19.
(3) 13 App. Cas. 657.
(4) 13 App. Cas. 679.
(5) Ibid. 698.
(6) Ibid. 669.

At the commencement of this judgment I stated that in my view I cannot, for the purpose of construing the description of the parcels in the deed of 1852, regard the fact that the company paid so many hundred pounds per acre, but I think I can regard it as a factor to enable me to answer, in connection with all the other facts, the question as to what was the nature of this transaction. Is it possible in this transaction that the railway company should have bought and paid so large a sum for the mere right of an easement over the surface (for that is practically what it is), with a right of support so long as the clay is not worked and a right of pre-emption of the soil, that is the clay, when it is worked, and how could you (to apply Lord Macnaghten's words) value this land at Swan Lane at so much per acre when by the hypothesis you are to separate the land for the purpose of valuation from the ordinary constituents of which it is in fact composed, and which are in substance the whole of the land itself? I am very conscious of the difficulty of the case, but I have arrived at the conclusion, for the reasons that I have stated, that the plaintiffs are right. I think that in this transaction, and having regard to the nature of this land, the clay was not a mineral reserved by force of s. 77 of the Railways Clauses Act, 1845, and that the plaintiffs are entitled to an injunction and the costs of the action. I desire to add an expression of my gratitude for the very great assistance which counsel gave me in the argument of the case. If, in considering the authorities, I have overlooked or paid insufficient attention to any consideration to which I ought to have given weight, the fault is due to my own imperfection, and not to any want of assistance from the counsel who argued the case before me.

[His Lordship accordingly made a declaration that the clay was not a "mineral" within the meaning of the Act of 1845, and granted an injunction to prevent excavation except for the purpose of getting minerals, such injunction to be without prejudice to the defendants' rights under s. 77 of the Act.]

Solicitors: *R. R. Nelson; Needham, Tyer & Barrow, for E. Caddick, West Bromwich.*

W. C. D.

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## *In re* SUTTON.
## LEWIS *v.* SUTTON.

[00 S. 4255.]

*Charity—Mortmain—Will—Construction—Direction to Purchase Land and Build Dwelling-houses for the Poor—"Charitable Uses"—Mortmain and Charitable Uses Act*, 1891 (54 & 55 *Vict. c.* 73), *ss.* 7, 8—*Working Classes Dwellings Act*, 1890 (53 & 54 *Vict. c.* 16), *s.* 1, *sub-s.* 1.

Testator bequeathed personalty to trustees upon trust to purchase land and build houses thereon, and let the same at an undervalue to the poor of London and other populous places as a continuing trust:—

*Held*, that the words "charitable uses" in s. 7 of the Mortmain and Charitable Uses Act, 1891, meant the same thing as "purposes of the charity"; that the charitable uses in the present case were, therefore, the continuing trust to let the houses at less than their value, not the direction to purchase land and build houses, and that that trust was not affected by s. 7, but was a valid charitable gift.

*Semble*: The Working Classes Dwellings Act, 1890, does not apply to charities.

William Richard Sutton, by his will dated August 15, 1894, devised and bequeathed all his real estate and the residue of his personal estate to executors and trustees upon trust for sale and conversion, and to stand possessed of the net residue thereof after payment of debts and funeral and testamentary expenses—

"1. Upon trust to purchase or acquire from time to time freehold or copyhold land in London or any other populous place or town in England as sites for the erection of the model dwellings and houses hereinafter mentioned . . . .

"2. And upon further trust to build upon the sites so to be purchased or acquired as aforesaid model dwellings and houses for use and occupation by the poor, and from time to time to repair and rebuild the same, with power to enter into any contracts and to employ" necessary persons to pay outgoings . . . .

"3. And upon further trust to let the said dwellings and houses when so erected to the poor in the several districts in which they are erected at such rents (being below the full rents which could be obtained for the same) as my trustees shall in

their uncontrolled discretion in each case and from time to time determine, but so that the rents received by my trustees therefor shall be held by them for the general purposes of the trust intended to be hereby created, and shall form part of the trust premises.

"4. And I empower my said trustees in their uncontrolled discretion from time to time to sell any part" of the land so to be purchased, and to raise money upon mortgage.

5. He empowered his trustees to employ architects, builders, &c.

"6. The model dwellings and houses when erected to be called 'The Sutton Model Dwellings.'

"7. I direct that my trustees shall, if they in their absolute discretion think necessary, have power to raise money for all or any of the purposes aforesaid from any bank, insurance office, or other financial or public office or institution by way of loan upon security of all or any part of my property and estate. It being my will, desire, and intention by the means aforesaid to create a continuing trust for the purpose of supplying the poor in London and other populous places or towns in England with proper and sufficient dwelling-houses or lodgings at such rents (however low) as my trustees shall in each case in their absolute discretion consider the tenants can afford to pay and see fit to charge them (but I wish that some rent, however small, shall in each case be reserved and paid, and that no person or persons shall be allowed to live in the said dwelling-houses or lodgings rent free), but so nevertheless that my trustees are to be left in complete control of the said trust, and to have the amplest and fullest powers and discretions as to the methods by which the same shall be carried into effect, and in applying the trust premises in the execution thereof."

The testator died on May 20, 1900. Three of his next of kin and his heir-at-law brought this action for a declaration that the trusts of his will concerning his residuary estate and effects were void (1.) for perpetuity, (2.) under the Mortmain and Charitable Uses Acts, and (3.) in so far as they were in excess of the limits allowed by the Working Classes Dwellings Act, 1890.

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*H. Terrell, K.C.*, and *H. T. Whitaker*, for the plaintiffs. The only question now before the Court is whether a good charitable trust is constituted by the residuary gift in the will. The gift is void. It would have been invalid under the Mortmain and Charitable Uses Act, 1888. Although by s. 10 of that Act "assurance" includes "will," unless the context otherwise requires, it is clear that a will cannot comply with the requirements of s. 4. This gift is, therefore, void unless it is validated by the Mortmain and Charitable Uses Act, 1891.

This is a gift of personal estate to be laid out in the purchase of land, and s. 7 of the latter Act applies to it. The result is that the gift "for the benefit of the charitable uses" is good, and the direction to purchase land is struck out of the bequest. But if that is done there are in this case no charitable uses left. This trust consists simply in the purchase of land. Clause 1, which directs the purchase of land, must be struck out first. Then clause 2, which directs the trustees to build, must be struck out on the principle of the authorities which treat a power to build as equivalent to a power to buy land: *Drake* v. *Trefusis* (1) and similar cases. So the trustees cannot buy land, nor can they build on land which they have retained. These charitable uses consist simply of the purchase of land. The uses do not consist of the directions in clause 7 of the will, which shew what are the trusts of the charitable uses. The words in s. 7 are that the personal estate is to be held for the "benefit of the charitable uses." Therefore, unless the Court validates the charitable uses by sanctioning under s. 8 the purchase of land, there is no charitable trust. By s. 8 the Court can do that if satisfied that the land is required for occupation for "the purposes of the charity"; but the existence of that power does not make the gift valid, and the Court will not exercise it for the benefit of a different charity, nor, in order to apply the cy-près doctrine; nor will it extend the gift in the will by reading "charitable uses" as "purposes of the charity."

This trust is covered by the Working Classes Dwellings Act, 1890, under which the will has actually been enrolled.

(1) (1875) L. R. 10 Ch. 364.

That exempts by s. 1 from the Mortmain and Charitable Uses Act, 1888, gifts of land for working-class dwellings, but limits the quantity of land which may be assured by will to five acres. Under that section this gift is good, but only to the extent of five acres. It is a trust for providing dwelling-houses for the working classes. That subject is specially dealt with in the Act of 1890, and is, therefore, not affected by the wider terms of the general Act, the Mortmain and Charitable Uses Act of 1891.

*Ingpen, K.C.*, and *Ashton Cross*, for one of the next of kin.

*Astbury, K.C.*, and *L. S. Bristowe*, for the trustees.

*George Lawrence*, for the widow and two other defendants. Sect. 8 of the Act of 1891 does not enable the Court to create a charity. Under s. 7 it never begins at all, because no land can be purchased. I adopt the plaintiffs' argument that there is no trust except by the operation of s. 8; but I submit that that section does not authorize the Court to create a trust by sanctioning the purchase of land. The section only applies where there is an existing trust which can be better carried on by the purchase of land.

*Sir R. B. Finlay, A.-G.*, and *R. J. Parker*, for the Crown. The words "charitable uses" in s. 7 mean the same thing as "purposes of the charity" in s. 8. They are used in that sense in the preamble to the Charitable Uses Act, 1735 (9 Geo. 2, c. 36), and in s. 4, sub-ss. 1 and 2, of the Act of 1888. Clause 7 of this will shews what these charitable purposes are, and the earlier clauses only provide the machinery of the trust. So there is a charity for whose purposes the Court can under s. 8 sanction the purchase of land, and the residuary gift is good. The Working Classes Dwellings Act of 1890 does not apply to charities, and it does not restrict the operation of the general law under the Act of 1891; but if it does have this effect it is not in point here, for it provides no limit where money is directed to be laid out in the purchase of land.

*H. Terrell, K.C.*, in reply, referred to *In re Smith's Estate* (1), *Seward* v. *"Vera Cruz"* (2), and *In re White's Trusts*. (3)

(1) (1887) 35 Ch. D. 589. (2) (1884) 10 App. Cas. 59.
(3) (1886) 33 Ch. D. 449.

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BUCKLEY J. The key to the solution of the case lies, in my opinion, in the proper understanding of the sense in which the words "charitable uses" are used throughout, so far as I know, the statutes dealing with this matter. "Charitable uses" does not, I think, mean those clauses of the will which define the investment and deal with the funds, but means the same thing as "charitable purposes." To shew that I may refer to one or two of the statutes. I find that in t' Charitable Uses Act, 1735 (9 Geo. 2, c. 36), s. 1, the expressio.. is used in this connection: that no hereditaments should be given, and so on, "in trust or for the benefit of any charitable uses whatsoever" unless such gift is made by deed, and so on. And in the Charity (Conveyances) Act, 1828 (9 Geo. 4, c. 85), s. 1, the expression is used in the same way: "Every deed for the purpose of the conveyance of lands in trust or for the benefit of charitable uses." The same expression occurs in the Mortmain and Charitable Uses Act of 1888 (51 & 52 Vict. c. 42) in s. 4: "Every assurance of land to or for the benefit of any charitable uses, and every assurance of personal estate to be laid out in the purchase of land to or for the benefit of any charitable uses, shall be made" in a certain manner. And then when I come to the sections in the Act of 1891, on which the question here arises, I find that same expression—"to or for the benefit of the charitable uses."

Now, in this will, as it seems to me, I have in the first place to ascertain what are the charitable uses to which this testator has given his fortune. Mr. Terrell has argued that the "charitable uses" are to be found in clauses 1 and 2 of the will, which (1.) direct the purchase of lands for the erection of model dwellings and houses, and (2.) declare a trust for building upon the sites so to be purchased or acquired. I do not think that is the true view. The dominant clause of the will which defines the charitable use is clause 7, where the testator says: "It being my will, desire, and intention by the means aforesaid to create a continuing trust for the purpose of supplying the poor in London and other populous places or towns in England with proper and sufficient dwelling-houses or lodgings at such rents (however low) as my

trustees shall in each case in their absolute discretion consider the tenant can afford to pay and see fit to charge them," with the direction that some rent, however small, shall be reserved. In order to give effect to that charitable purpose, he directs that the fund which he creates by the conversion of his whole real and personal estate shall be laid out in the purchase of land and in buildings on land. But the "charitable use" is the devotion of the buildings when erected to the housing of people of small means at rents below the rack rental of the property. Under the Mortmain and Charitable Uses Act of 1888, lands and personal estate to be laid out in the purchase of land could not be assured by will. That was altered by the Act of 1891, and that Act provided that land may be assured by will to or for the benefit of any charitable use, with a provision for its sale within a year from the death, or such longer time as the Court or the Charity Commissioners might allow. That section—5—of the Act of 1891 is not the one relevant to this case. What I have to deal with here is a fund of personal estate, because the direction is to convert all his personal estate into money. It is a direction to invest personal estate in the purchase of land, and in the erection of buildings on land. Now that matter is dealt with by ss. 7 and 8 of the Act of 1891, and in my judgment those two sections are intended to cover the whole field. They may be read together thus: "Personal estate directed to be laid out in the purchase of land for charitable uses shall be held for the charitable uses as though there had been no direction to lay out in land; provided, that if the Court is satisfied that the land is required for actual occupation for the purposes of the charity, and not as an investment, then the Court may sanction the acquisition of the land."

The argument presented to me by Mr. Terrell is this. He does not deny that under s. 8 the Court could, if the land were wanted for actual occupation, give validity, as he expresses it, to the trust; but he says, unless validity is so given to the trust then s. 7 cannot apply, because the personal estate would be held for the benefit of charitable uses, which are to lay it out in the purchase of land, which by the hypothesis when you get to s. 8 you cannot deal with. That argument involves a

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fallacy. It invites me for the purposes of s. 7 to strike out clauses 1 and 2 from the will, and say that the trust is invalid, and then put them in again for the purposes of s. 8, when the Court is applied to, to say that, inasmuch as the land is wanted for the purposes of the charity, validity may be given to it. The testator's disposition must be either good or bad, and it cannot be made good by an application to be made to the Court on a disposition which by the first hypothesis is bad. The argument involves this—that ss. 7 and 8 do not cover the same field, but that one is applicable in one event, and not in another. It appears to me that that is not so. Looking a little closely at the language, I find that in s. 7 the expression used is that to which I called attention, and which I found in the previous Acts—"to be held to or for the benefit of the charitable uses." That language is varied in s. 8, and the language there is—"required for actual occupation for the purposes of the charity." That variance of language does not, I think, indicate any difference of intention. "The charitable uses" in s. 7 and "the purposes of the charity" in s. 8 mean the same thing. What is the charitable disposition which the testator has directed? It is one to provide dwellings for the poor at a reduced rent. That that is a good charitable trust is not disputed. It appears to me that the disposition is good.

I ought perhaps to add a word on the Working Classes Dwellings Act of 1890, which has been referred to. If I am right in the view I have taken of the Act of 1891, nothing arises on the Act of 1890. But in any case I should have thought that that was not an Act which had any bearing on this particular case, because the Act of 1890 is not an Act dealing with charitable matters, but is an Act providing for erecting dwellings for the working classes. Now, the poor need not necessarily be poor of the class known as the working class, and many of the working class, as we know, are not poor. It seems to me it is dealing with a different subject-matter altogether. My decision is based wholly on the Act of 1891.

Solicitors: *Routh, Stacey & Castle; Solicitor to the Treasury; Lamb, Son & Prance; Darley & Cumberland.*

H. C. R.

## ATTORNEY-GENERAL *v.* ESHER LINOLEUM COMPANY, LIMITED.

BUCKLEY J.

1901

*July* 24, 25, 26.

[00 A. 1766.]

*Injunction—Right of Way—Public Footway—Private Carriage-way along the same Line—Width of Footway—Presumption—Dedication.*

Where there is a public footway, and adjacent land along the same line as the footway, but increasing the width, is laid out by the owner of the soil as a way for carriage traffic, even for private carriage traffic, the presumption of law, in the absence of evidence to the contrary, is that the owner has dedicated to public use as a footway all the space that he has devoted to traffic in fact.

THIS was an action by the Attorney-General, on the relation of the urban district council of Esher and the Dittons, for an injunction to restrain the defendants from inclosing or encroaching on a strip of land alleged to form part of a public highway near Esher. The land in question was a rectangular strip on the north side of the London and South Western Railway main line, and ran from an arch under the railway on the east to the river Mole on the west. It was bounded on the south by the fence at the foot of the railway embankment, on the north by permanent fences or walls, including the wall of the defendants' premises, and varied from forty feet to fifty feet in width. The defendants' mills were situated at the west end and north side of the strip, and they were owners of the soil of the strip opposite their premises. There was a foot-bridge over the river Mole at the north-west corner of the strip, and a public right of footway over it and along some part (but what part was in dispute) of the strip to the railway arch. There was also a private carriage-way along the whole width of the strip from the arch to the mill gates, or, as the plaintiffs contended, over the whole width of the strip up to the river Mole, which at this point was not open to the public. (See *Bourke* v. *Davis*. (1)) The defendants had recently inclosed some part of the strip which lay opposite to their premises and on the

(1) (1889) 44 Ch. D. 110.

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south side of the strip. The plaintiffs alleged that the public right of footway extended over the whole width of the strip, whilst the defendants contended that the right was confined to what they alleged to be a well-defined track with which they had not interfered, and that this track ran alongside of their premises on the north side of the strip from the bridge to the mill gates, and then crossed to the south of the strip, and continued along the railway fence to the arch.

*Macmorran, K.C., H. Terrell, K.C.*, and *E. S. Ford*, for the plaintiffs. The public are entitled to walk over the whole of the strip. The fences on each side of it are very old, and the private carriage-way extends over every part of it; therefore foot-passengers have the same right, and the defendants cannot inclose this piece of land.

*Astbury, K.C.*, and *G. Henderson*, for the defendants. There has never been a public carriage-way over this strip. There is only a private carriage-way to the mill, and it does not extend to the river Mole.

[BUCKLEY J. The question is whether the owner of the soil has dedicated the strip to the public. If there is in existence a public footway, and the owner of the soil fences off as a private carriage-way a wider strip along the same line, is it not the legal presumption that he has dedicated to the public a right of footway over all the soil which he has in fact devoted to traffic?]

There is no presumption; it is a question of evidence. But if there is, it does not apply to this case, for the piece of ground we have inclosed is beyond the mill gates, and, therefore, beyond the end of the carriage-way; and, further, the fence on the south side of the strip was put up, so far as is known, by the railway company. The railway company was not owner of the soil of the strip; so there can be no presumption of dedication. No doubt the fence was the fence of the strip as well as of the railway; but that is not enough, and the Court will not assume that it was put up by or adopted by the owner of the strip. The evidence shews that there has never been any dedication.

*Macmorran, K.C.*, in reply. An occupation road can be also a public footway: *Brownlow* v. *Tomlinson* (1); *Wells* v. *London, Tilbury and Southend Ry. Co.* (2) There is no authority on the question how far a public footway is presumed to extend across a private carriage-way over the same line. The date of these fences is uncertain; but we suggest that the owner of the soil found the railway fence existing and put up the fence on the north side of the strip in order to mark out the road. The ordinary presumption is that if the public are admitted to a space between fences they are admitted to the whole of it: *Grand Surrey Canal Co.* v. *Hall.* (3) A public right of way cannot be restricted to part of the space: *Hutton* v. *Hamboro.* (4)

BUCKLEY J. described the strip of land, and said that the fence on the south side had probably been put up by the railway company, but there was no evidence to shew when the fence on the north side had been erected; and that if the public footway extended over the whole surface of the strip the defendants could not inclose any part of it; and continued:—

Now the question, I think, is a pure question of fact; but in determining the question of fact I am bound to proceed upon certain legal presumptions; and I will state in the first instance what it appears to me the legal presumptions are. In the first place, I presume that the public right of footway existed before the private right of carriage-way existed. In the second place, it seems to me that where you have a public right of footway across land and you find a certain amount of surface of land lying along the course of the public footpath devoted to traffic, even if it be private traffic, then primâ facie the owner of the soil must be taken to have dedicated to the public so much of the surface as he has in point of fact devoted to traffic, even if it be private traffic.

In all these cases of right of way it is necessary to remember that the thing to be established is dedication, not user. A

(1) (1840) 1 Man. & G. 484.
(2) (1877) 5 Ch. D. 126.
(3) (1840) 1 Man. & G. 392, 402, 406.
(4) (1860) 2 F. & F. 218.

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highway is not acquired by user. You cannot acquire a right of public way under the Prescription Acts. If you want to acquire a right by prescription you must go back to the time of Richard I.—to a time before legal memory. In most of these cases dedication, it is true, is proved by user. But user is but the evidence to prove dedication: it is not user, but dedication which constitutes the highway; therefore, what always has to be investigated is whether the owner of the soil did or did not dedicate certain land to the use of the public. Where I find a certain amount of land laid out for the purpose of traffic, even though it be private traffic, and there is along the same line a right of public footway, it seems to me that, in the absence of evidence to the contrary, I ought to presume that the landowner dedicated to the public for the purpose of such right of traffic as they had all that land which he devoted to traffic in fact. I have asked, and I am told that really there is little or no authority upon that question. It seems to be new, except that in *Grand Surrey Canal Co.* v. *Hall* (1) I find Maule J. (2) stating this: "It seems to me that the circumstance of the bridge being originally erected, as a carriage-way, for the accommodation of a considerable number of individuals, inasmuch as the company must either have permitted the bridge to be used indiscriminately, or have put themselves to great expense in employing some person to see that those passing had a right to do so, furnishes a strong reason why they should have intended to dedicate the bridge to the public." The facts in that case were that the bridge was built to accommodate a private right of carriage-way. Over the same line of country there existed a public right of footway. After the bridge was erected the public did come there with carriages, and the owners did not raise any objection. What was the proper inference from that state of facts? The owner of the soil might of course have posted some one there to see that no one with a carriage passed unless he was entitled to a private right of carriage-way. He did not do so. Why did not he do so? Because it was not worth his while to discriminate between one and the other.

(1) 1 Man. & G. 392. (2) 1 Man. & G. 406.

There you have the animus dedicandi—that he meant the public to come there if they liked. So here it appears to me I ought to apply the same principle. When the owner of the soil devoted this rectangular strip to traffic of some kind and there was the public right to pass along the same line of country, he might, if he had been so minded, have kept the public to a particular line. He might have inclosed the footway between fences, if he could have done so consistently with the carriage-way, or he might have paved part of the way and said, "You must walk upon that and must not depart from it"; or he might have put a servant there and made everybody who was on foot go on that particular line. If he did nothing of the sort, if in point of fact he devoted that surface to traffic of some kind, then I think that the proper presumption is that he intended the public, who were entitled to access to some part of that piece of ground, to have a right to go all over that piece of ground in exercise of their right of public footway. Primâ facie that is a dedication to the public as a footway of all the surface which he devoted to traffic. If that be right, the next question to ascertain is, Did the owner of the soil devote the whole of this rectangular strip, including the piece which has been inclosed, to the purposes of a roadway?

[His Lordship further said that on the documentary evidence it was clear that the defendants had appropriated the whole of the strip as a roadway and had not interfered with the public going where they pleased on it; and, therefore, that he ought to presume that they as owners of the soil intended to dedicate it to the public. The defendants' evidence had failed to rebut this presumption, and the plaintiffs were entitled to an injunction.]

Solicitors: *Charles Mylne Barker; Wilson & Son.*

H. C. R.

C. A.
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BYRNE J.
*July* 13, 20.
C. A.
*July* 31.

## SILKSTONE AND HAIGH MOOR COAL COMPANY *v.* EDEY.

[1895 S. 2153.]

*Costs—Taxation—Order to Tax Costs and to include therein Remuneration of Receiver—Separate Certificate as to Costs only—Rules of Supreme Court, Order* LXV., *r.* 27, *sub-r.* 25.

Under an order directing the taxing master to tax the plaintiffs' costs of an action, including the remuneration of the receivers and managers appointed in the action, and to certify the balance after deducting certain costs of the defendants, the taxing master has no power to make a separate certificate for the costs alone.

By an order dated November 8, 1899, it was, amongst other things, ordered that "it be referred to the taxing master to tax the costs of the plaintiffs, the Silkstone and Haigh Moor Coal Company, Limited, of this action up to and including this judgment, including the costs and remuneration of the receivers and managers, and the costs of taking and transcribing a short-hand note of the judgment delivered on the 21st of March, 1899, and discussion on minutes on the 28th and 29th March, 1899, but not including the costs of the respective motions by the defendants, John Edey and the Silkstone and Haigh Moor Collieries, Limited, to vary minutes: And it is ordered that it be referred to the taxing master to tax the costs of the said defendants, John Edey and the Silkstone and Haigh Moor Collieries, Limited, of their respective motions to vary minutes, and the taxing master is to deduct the said costs of the said defendants from the plaintiffs' costs hereinbefore directed to be taxed, and to certify the balance: And it is ordered that the said defendants, John Edey and the Silkstone and Haigh Moor Collieries, Limited, and each of them do pay to the plaintiffs, the Silkstone and Haigh Moor Coal Company, Limited, the balance so to be certified." The taxing master did not certify the balance as directed by the judgment, but he issued a separate certificate in which he said: "In pursuance of the order . . . . I have taxed the costs of the plaintiffs, by the said order directed to be taxed, at the sum of 5751*l.* 12*s.* 10*d.*, except that I have not included the costs and remuneration of the receivers and managers by the said order directed to be

included therein, the same not having yet been ascertained in the chambers of the judge to whom this action is referred; and I have taxed the costs of the defendants, by the said order also directed to be taxed, at the sums following—namely, the costs of the defendant, John Edey, at 53*l.* 9*s.* 1*d.*, the costs of the defendants, the Silkstone and Haigh Moor Collieries, Limited, at the sum of 44*l.* 17*s.* 5*d.*, and I have deducted the costs of the said defendants from the plaintiffs' said costs, and I hereby make this separate certificate, and certify that after such deduction there remains a balance of 5653*l.* 6*s.* 4*d.* due to the plaintiffs in respect of their said costs, not including the amount of the said costs and remuneration of the receivers and managers, which, when ascertained, I propose hereafter to certify in addition to the said balance of 5653*l.* 6*s.* 4*d.*"

It was stated that the separate certificate was made on account of the length of time which must necessarily be taken up in ascertaining the amount due to the receivers and managers.

A summons was taken out by the defendant Edey, asking that the taxing master's certificate might be discharged on the ground that it had not been made pursuant to the order of November 8, 1899, and that, in the absence of special provision enabling the taxing master to make two certificates, he was not at liberty to issue two certificates under the said judgment; or, in the alternative, that the order might be treated as final, and no further allowance made for remuneration.

The summons was heard before Byrne J. on July 13, 1901.

*Levett, K.C.*, *Rowden, K.C.*, and *Buckmaster*, in support of the summons. The order for taxation is explicit. The taxing master is to tax the plaintiffs' costs, including the costs and remuneration of the receivers and managers, and, after deducting the costs of the defendants of certain specified matters, he is to certify the balance. Under that order the taxing master has no power to make a separate certificate as to the costs alone. The Court has directed him to certify the balance after deducting the defendants' costs from the plaintiffs'; he cannot make two certificates. In order to give the taxing master authority to make a separate certificate, it must be specially mentioned in the order for taxation.

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*Stafford Crossman*, for the defendants, the Silkstone and Haigh Moor Collieries, Limited, in the same interest.

*Norton, K.C.*, and *P. F. Stokes*, for the plaintiffs. Under the old practice the taxation of costs was performed by the masters in ordinary. By Order LXX. of the Orders of April, 1828 (1), for the regulation of the practice and proceedings in the Court of Chancery issued in pursuance of the Report of the Chancery Commission, it was provided that the master should be at liberty upon the application of any party interested to make a separate report or reports from time to time as to him should seem expedient. So that at that time it is clear the master could make a separate report as to costs. After the abolition of the masters in 1852 (15 & 16 Vict. c. 80) and the appointment of taxing masters, it was provided by Order XL., r. 1, of the Consolidated Orders, 1860, that the taxing masters should perform all such duties as were formerly referred to or performed by the masters in ordinary in relation to the taxation of costs, and should in respect thereof have all such powers and authorities as were formerly vested in the masters in ordinary, and among the powers referred to was that of making separate reports and certificates. At the date, therefore, of the passing of the Judicature Act, the taxing masters had power to make separate certificates. By Order LXV., r. 27, sub-r. 25, of the Rules of the Supreme Court, the taxing masters have power and authority in relation to the taxation of costs to perform all such duties as are by general orders directed to be performed by any of the masters, taxing masters, registrars, or other officers of any of the Courts whose jurisdiction is transferred to the High Court, and have such powers and authorities as were vested in any such officers, including among those powers the making separate certificates or allocaturs. We submit that in this case the taxing master was clearly acting within his rights and powers in making the separate certificate of costs which he has done, and that this summons must be dismissed with costs.

*Levett, K.C.*, in reply.

*Cur. adv. vult.*

(1) Appendix to 2 Russ. p. 24.

July 20. BYRNE J. stated the facts, and continued :—I may mention with reference to the costs and remuneration of the receivers and managers, that that is sometimes settled by the taxing master himself, and sometimes, I think rather more frequently, the receivers having been appointed by the Court, it is referred to the master in ordinary to fix the costs and remuneration of the receivers and managers so far as the remuneration is not fixed at the time of their appointment, or shortly afterwards. In this case the taxing master thought it was a proper case to have that ascertained by the master in ordinary, and therefore he has sent it to him, and that is still pending.

Now it is obvious that the result of this certificate is that the master has not certified according to the exigency of the judgment—that is to say, he has not fixed everything that he was told to fix, and made all the deductions he was there told to deduct, and certified the final balance. This is equally true, that in any event this sum of 5653*l.* 6*s.* 4*d.* must be payable, and the only difference that can be made by waiting for the further certificate will be that there will be a larger sum for the balance so to be found. A motion is now made on behalf of the defendant Edey to discharge the certificate on the ground that it has not been made pursuant to the judgment, and that, in the absence of special provisions enabling the taxing master to make two certificates, he is not at liberty to issue two certificates. I have no doubt that the taxing master has, in a proper case, a right to make a separate certificate. The point in this case is whether he can make two certificates on a judgment framed in this manner, pointing to one balance to be found and certified, which balance is to be paid. The old practice is referred to and the history of it given in Daniell's Chancery Practice—I am quoting from the 5th edition, p. 1307 : "Originally, all references for the taxation of costs were made to the masters in ordinary : who used to be attended for that purpose by the clerks in court of all parties. In consequence, however, of the multiplicity of business in the masters' offices, it gradually became the practice to leave all the details of the taxation to the clerks in court, and only to call upon the

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master to decide any question of principle that happened to arise. Upon the abolition of the office of Six Clerks, new officers, called taxing masters, were appointed for this particular duty: who perform all the duties before that time performed by the masters in ordinary in relation to the taxation of costs; and have, in respect thereof, all the powers and authorities formerly vested in the master in ordinary, to administer oaths: examine witnesses and parties: order the production and inspection of books, papers, and documents: proceed de die in diem: make separate reports and certificates: require that any party be represented by a separate solicitor: and direct and adopt all such other proceedings as might formerly be directed and adopted by the masters in ordinary, on references for the taxation of costs, and taking accounts of what is due in respect of such costs, and such other accounts connected therewith as may be directed by the Court." I need only just refer to the General Orders of 1828. I refer to the 70th of them, to shew that the old masters in ordinary had power to make a separate report or reports: "In all matters referred to him, the master shall be at liberty, upon the application of any party interested, to make a separate report or reports from time to time as to him shall seem expedient; the costs of such separate reports to be in the discretion of the Court"; and the 71st refers to this case: "Where a master shall make a separate report of debts or legacies, there the master shall be at liberty to make such certificate as he thinks fit with respect to the state of the assets." Then under Order XL., r. 1, of the Consolidated Orders of 1860, it is provided "that the taxing master shall perform all such duties as were formerly referred to or performed by the masters in ordinary in relation to the taxation of costs; and shall in respect thereof have all such powers and authorities as were formerly vested in the masters in ordinary," and, amongst other things, to make separate reports and certificates.

As I have said, I have no doubt whatever as to the power to make separate certificates in proper cases. To give an illustration, not at all intending it as an exclusive example, of where I think a taxing master could clearly make a separate certifi-

cate: suppose a plaintiff brought an action against two defendants, and at the trial the action is dismissed as against one defendant with costs, but the plaintiff succeeds as against the other defendant, and an order is made for that other defendant to pay the plaintiff his costs. I see not the slightest objection to an order directing taxation and payment of those costs, and to a separate certificate being issued directly one of those sets of costs is ascertained. That is to say, if the costs that the plaintiff has to pay the defendant A. are first ascertained, I see no reason why a separate certificate should not be given. But that is quite different from a case like the present, where it is not in obedience to the exigency of the original judgment, and where it clearly does affect the interests of the defendants. I am far from saying that it may not be judicious to have a rule pointing to this very matter, but I have inquired in the taxing masters' office, and it is clear that there never has been, and there is not, any such practice as making a separate certificate without a special direction for the purpose where the judgment directs a particular balance to be certified.

I may mention, because it has some little bearing on the matter, that quite recently, on July 4, 1901, a new rule (Rules of the Supreme Court, Order LII., r. 26) (1) has been published providing for an interim certificate: "If, during the taxation of any bill of costs or the taking of any account between solicitor and client, it shall appear to the taxing master that there must in any event be moneys due from the solicitor to the client," then it is said: "the taxing master may from time to time make an interim certificate as to the amount so payable by the solicitor. Upon the filing of such certificate the Court or a judge may order the moneys so certified to be forthwith paid to the client or brought into court."

In the present case I think the more convenient course would be to direct this certificate to be taken off the file and embodied in the certificate to be made. The only other way would be to leave it on the file and direct that it was not to be acted upon, but to be embodied in the other certificate; but I am told there is no expense attaching to taking it off the file.

G. M.

(1) W. N. (1901) Pt. II. 235.

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The order accordingly directed that "the taxing master's said certificate, dated 14th June, 1901, be taken off the file of this court, and that the amounts thereby certified be included in the taxing master's final certificate to be made in this action."

The plaintiffs appealed. The appeal was heard on July 31, 1901.

*Upjohn, K.C.*, and *P. F. Stokes*, for the appellants.

*Levett, K.C.*, *Rowden, K.C.*, and *Buckmaster*, for the respondent Edey.

*Stafford Crossman*, for other defendants.

[The same arguments were made use of as in the Court below, and Daniell's Chancery Practice, 6th ed, pp. 1141, 1255, Morgan and Wurtzburg on Costs, 2nd ed. p. 477, and Rules of the Supreme Court, Order LXV., r. 19 E, were also referred to.]

RIGBY L.J. I am of opinion that we cannot make the order asked for by the appellants, and that in fact the order made by the learned judge was quite right, and that he had no choice but to make the order he did. Whether it may not be desirable to give further powers to the taxing masters so as to enable them to make separate certificates in such circumstances is another matter. The question before us is whether the taxing master had the power to make this certificate, and in my opinion he had not.

COLLINS L.J. I agree.

ROMER L.J. I agree.

Solicitors: *Bell, Brodrick & Gray, for Rodgers, Thomas & Sandford, Sheffield; Clements, Williams & Co.; T. W. Hall.*

H. C. R.

BYRNE J.
1901
July 19, 25.

## *In re* POWER.
## *In re* STONE.
## ACWORTH *v.* STONE.

[1901 P. 1148.]

*Estate Duty—Incidence—Exercise of General Power of Appointment by Will—Appointed Fund—Residue—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 9, *sub-s.* 1.

Where a general power of appointment over a fund is exercised by will, the appointed fund does not pass to the executor "as such," and consequently the estate duty in respect thereof is payable out of the appointed fund in the absence of any direction in the will to the contrary.

*In re Moore*, [1901] 1 Ch. 691, dissented from.

*In re Treasure*, [1900] 2 Ch. 648, and *In re Maddock*, W. N. (1901) 118, followed.

JAMES STONE by his will, dated April 17, 1863, gave all his real estate and the residue of his personal estate to trustees upon trust for conversion, and after the death of his wife (which happened some years ago) to set apart a sum of 2000*l.* for the benefit of his daughter Ellen Louise Power, and subject thereto one-half of the capital of the trust fund was to be held upon the trusts therein mentioned, and as to the remaining half part of the capital of the trust fund, together with the said sum of 2000*l.*, upon trust to pay the income thereof to the said Ellen Louise Power for her life; and in the event of her having no children (which happened), as to one moiety in trust for such persons for such interests, and generally in such manner in all respects as the said Ellen Louise Power should by will appoint, and as to the other moiety in trust for such persons being of her blood and of kin to her as she should by will appoint.

The testator died January 4, 1865.

The said Ellen Louise Power by her will, dated May 16, 1896, after reciting the powers of appointment given to her by the will of her father, appointed that one moiety of the settled fund should be held by her trustees upon trust to invest the same and pay the income thereof to her brother, the defendant

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James Doveton Stone, for his life, or until the occurrence of any of the contingencies therein mentioned; and after his decease she directed her trustees to stand possessed of the said moiety upon trust to distribute the same equally between the children of her said brother who should be living at her death; and as to the remaining moiety of the settled trust fund she appointed the same equally between her three cousins therein named; and as to the residue of her estate real and personal she devised and bequeathed two-thirds thereof equally between the three defendants, Eugenia Power, Winifred Power, and Kate Power, and the remaining one-third equally between the two daughters of Frances Urwin; and she appointed the plaintiffs trustees and executors of her will.

The testatrix died January 31, 1900, and the executors paid the estate duty in respect of the moiety of the settled fund over which the testatrix had a general power of appointment, amounting to the sum of 215*l.* 17*s.* 2*d.*

This was a summons by the executors asking for the decision of the Court upon the question whether the estate duty was payable out of the appointed fund or out of the residue.

*Horsley*, for the summons.

*Church*, for the appointees. The estate duty in respect of the appointed fund is payable out of the residue. It is property which "passes to the executor as such" within the meaning of the Finance Act, 1894, and therefore does not fall within s. 9, sub-s. 1, of that Act: *In re Moore.* (1) In that case Buckley J. differed from *In re Treasure* (2), where Kekewich J. held that the estate duty was payable out of the appointed fund.

*R. J. Parker*, for the residuary legatees. The expression vesting in the executor as such had a well-defined meaning before the Finance Act, 1894. In former times the question was of frequent occurrence whether the assets in the hands of the executors were legal or equitable assets—legal assets being those that a creditor could reach in a Court of Law, whereas equitable assets could only be made available in a Court of Equity: it was immaterial what the nature of the

(1) [1901] 1 Ch. 691. (2) [1900] 2 Ch. 648.

property was, the test being whether or not it vested in the executor as such. The property here is a purely equitable asset, which could only be reached in a Court of Equity. It does not vest in the executor virtute officii, but by virtue of the appointment. Prior to the passing of the Act 23 Vict. c. 15, property over which the deceased had a general power of appointment only was not subject to probate duty: *Drake* v. *Attorney-General* (1); *Platt* v. *Routh* (2); and the effect of that Act was to make the appointed funds liable to probate duty, but not to cause that to pass to the executor as such which had not previously so passed. James L.J. in *In re Hoskin's Trusts* (3) did not intend to decide that the executor was entitled to receive the fund "as such," but that he must prove the will and constitute himself executor before he could have the fund handed over. The will has to be produced as part of the evidence of title of the executor. By the Finance Act estate duty is substituted for the other duties, including probate duty, and there is nothing in the Act to shew that it was intended to alter the incidence of the duty. Before the Act the fund in question would have been equitable and not legal assets, and it was not intended that the effect of s. 9 should be to convert equitable into legal assets, and to cause property to pass to the executor virtute officii which had not previously so passed. I submit that the decision of Kekewich J. in *In re Treasure* (4) is correct, and that the estate duty in this case is payable out of the appointed fund. [He also referred to *Attorney-General* v. *Brunning* (5); *In re Davies' Trusts* (6); *In re Thurston* (7); *Cook* v. *Gregson* (8); *Holmes* v. *Coghill* (9)]

*Church*, in reply. The Finance Act draws no distinction between legal and equitable assets; the object of the section in question was to make the executor liable for duty on all property coming under his control. I submit that the decision in *In re Moore* (10) is correct.

*Cur. adv. vult.*

(1) (1843) 10 Cl. & F. 257.
(2) (1841) 3 Beav. 257.
(3) (1877) 6 Ch. D. 281.
(4) [1900] 2 Ch. 648.
(5) (1860) 8 H. L. C. 243.
(6) (1871) L. R. 13 Eq. 163.
(7) (1886) 32 Ch. D. 508.
(8) (1856) 3 Drew. 547.
(9) (1806) 12 Ves. 206; 8 R. R. 323.
(10) [1901] 1 Ch. 691.

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July 25. BYRNE J. The question raised by this summons is whether or not, where a general power of appointment by will over a fund has been exercised, the appointed fund passes to the executor "as such" within the meaning of that expression as used in s. 9, sub-s. 1, of the Finance Act, 1894. If it does so pass, estate duty is payable out of the residue; if not, it has to be borne by the appointed fund. In the case of *In re Treasure* (1), Kekewich J. held that the appointed fund does not under such circumstances pass to the executor "as such"; but there was another ground of decision—namely, that the duty fell within the description of testamentary expenses which were directed to be paid out of residue, and, consequently, that although the fund did not pass to the executor "as such," the duty fell to be paid out of the residue. In the case of *In re Moore* (2) Buckley J. declined to follow the opinion expressed by Kekewich J., and held, in a case where there was no direction as to payment of testamentary expenses, that the appointed fund did pass to the executors "as such," and that the estate duty was on that ground payable out of residue. The point again came before Kekewich J. in the case of *In re Maddock* (3), where there was no direction as to payment of testamentary expenses, when, as I am informed, without fresh argument he adhered to his opinion as expressed in *In re Treasure* (1), notwithstanding the decision in *In re Moore*. (2) In this state of the authorities I am bound to express my own opinion upon the question. The rule is that property subject to general powers of appointment becomes assets for the payment of the appointor's debts, if the power is actually exercised in favour of volunteers, and Lord Hardwicke, in *Lord Townshend* v. *Windham* (4), points out that "if there is a power to execute by will or deed, though executed by will, it operates not as a will to that purpose, but as an appointment, not as an appointment of his own assets, but of the estate of another, and takes not place by force of the will." Prior to the passing of the Act 23 Vict. c. 15, property over which the deceased had a general power of appointment only was not subject to probate duty. This was

(1) [1900] 2 Ch. 648.
(2) [1901] 1 Ch. 691.
(3) W. N. (1901) 118.
(4) (1750) 2 Ves. Sen. 1, 10.

decided in *Drake* v. *Attorney-General* (1), affirming the decision of Lord Langdale in *Platt* v. *Routh*. (2) In *Drake* v. *Attorney-General* (1) the Lord Chancellor, in giving the unanimous opinion of the House and of the judges, says (3): "The property here taken by Mrs. Platt for her life, was taken not subject to any power of appointment for any persons specially named, and is therefore subject to legacy duty in the hands of her appointees. But on the other hand, the property appointed was not property which, within the meaning of the Act as applied to the schedule imposing the probate duty, was so completely her property as to render it liable to that duty; so that the judgment of the Court below appears to be right in both instances." Lord Langdale's decision in *Platt* v. *Routh* (2) was in accordance with the certificate of the Court of Exchequer. (4) Lord Abinger, in giving the judgment of that Court, says (5): "In that case," referring to a case of *Attorney-General* v. *Hope* (6), "which was very fully considered, the House of Lords held, that probate duty was not payable in respect of such parts of the testator's assets as were situate in America at the time of his death; and the broad ground on which that decision rested was, that probate duty is granted in respect of such part only of the assets as the executor can recover by virtue of the probate, being in fact that property which, but for the will, the ordinary would in early times have been entitled to apply in pios usus. Now, although Judith Ann Platt had what we consider an absolute power of appointment over the property in question; yet it is clear, that the ordinary never could, under any circumstances, have had any right whatever to interfere with it; and it is also certain, that, whether probate be granted or not, the executor, quâ executor, can have no title to any part of the property." Lord Langdale, in the course of his judgment, says (7): "The next question is whether the residuary estate of John Ramsden, appointed by the will of Mrs. Platt, is chargeable with probate duty upon the

(1) 10 Cl. & F. 257.
(2) 3 Beav. 257.
(3) 10 Cl. & F. 288.
(4) (1840) 6 M. & W. 756.
(5) 6 M. & W. 790.
(6) (1834) 1 C. M. & R. 530; 37 R. R. 29.
(7) 3 Beav. 281,

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probate of the will of Mrs. Platt; and I am of opinion that it is not. It was not the property of Mrs. Platt, and could not be recovered by her executors by virtue of the probate. It would be singular that the rule of this Court, which requires a probate merely as evidence, to shew that the instrument of appointment is a will, should have the effect of subjecting the property to duty as if it had been the property of the testator, which this Court does not consider it to be." I pass by another passage. "But the 38th section of the Act (55 Geo. 3, c. 184) appears to me to shew that the Act only relates to the estate and effects of the deceased for or in respect of which the probate is granted, and as this was not the property of the deceased, I am of opinion that no duty is payable in respect of it." It is, I think, quite clear that the appointed property was considered not to pass to the executor virtute officii or "as such." Kindersley V.-C., in *Cook* v. *Gregson* (1), in considering the difference between what are legal and what are equitable assets, says (2): "I think the general principle is, that a Court of law would treat as assets every item of property come to the hands of the executor which he has recovered, or had a right to recover, merely virtute officii, that is, which he would have had a right to recover if the testator had merely appointed him executor without saying anything about his property or the application thereof." Lord Chelmsford, in *Attorney-General* v. *Brunning* (3), expressly approves of this passage. In the last-mentioned case the question was whether money paid to an executor under a contract for sale of land entered into by the testator was legal or equitable assets, and Lord Cranworth observes (4): "With all deference to the Court of Exchequer, I think that Court fell into an error in treating this money as being equitable assets. It is a sum which the executor would take as executor, and which, therefore, would be legal assets in his hands. His right would not depend on anything contained in the will of Mr. Hope. Mr. Hope's administrator would have been entitled in case he had died intestate; and what an administrator is entitled to recover as administrator, virtute officii, can never be equitable

(1) 3 Drew. 547.
(2) Ibid. 550.
(3) 8 H. L. C. 243, 265.
(4) Ibid. 258.

assets." Lord Cranworth also points out that foreign assets were not liable to probate duty, not being recoverable by virtue of the English probate, and when they come to the hands of the executor they so come because he has established a title in a foreign jurisdiction. In *In re Davies' Trusts* (1) Wickens V.-C. states it as settled law that a testator who has a general power of appointment directing payment of his debts without more and appointing an executor makes the appointed fund liable, in aid of his own assets, for payment of his debts; and he expresses his opinion that the same rule would apply though no executor were appointed. I think that it is also established that the appointment of an executor without more would not make the fund assets: *In re Davies' Trusts* (1); *In re Thurston.* (2) In this state of the law the Act 23 Vict. c. 15, was passed; and the effect of ss. 4 and 5 is to make the appointed funds liable to probate duty, but not, as it appears to me, to cause that to pass to the executor "as such" which had not previously so passed. Passing to the case of *In re Hoskin's Trusts* (3), I do not myself think that James L.J. meant to express the opinion that the executor was entitled to receive the fund "as such," but that he must prove the will and constitute himself executor before he could ask to have the fund handed over. The production of probate would be necessary as proof of title on the part of the executor in his capacity as a person nominated to administer the fund and as shewing an appointment. Turning to the Finance Act and bearing in mind that estate duty was intended to be analogous to probate duty, I cannot gather any suggestion of intention to alter the incidence of duty in respect of funds appointed under a general power. Before that Act I consider that the fund in question would have been equitable assets and not legal. I do not think that by the Act it was intended, or that the effect of the section under discussion is, to convert equitable into legal assets, or to cause property to pass to the executor virtute officii which had not previously so passed, nor, as I have said, do I believe that James L.J., in the case of *In re Hoskin's Trusts* (3), meant so to decide, or to

(1) L. R. 13 Eq. 163, 166. (2) 32 Ch. D. 508.
(3) 6 Ch. D. 281.

BYRNE J. express an opinion which would have a similar result. I need not dwell upon the difficulty I have naturally felt in deciding in opposition to the opinion of Buckley J., but I consider that I ought to decide in accordance with the view expressed by Kekewich J. in the cases referred to.

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Solicitors for all parties: *Norris, Allens & Chapman.*

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*July* 16, 17; *Aug.* 10.

## *In re* HAEDICKE AND LIPSKI'S CONTRACT.

*Vendor and Purchaser—Leaseholds—Sale by Private Contract—"The Vendor's Title is accepted by the Purchasers"—Onerous Covenants—Duty of Vendor to disclose—Rescission.*

It is settled that a vendor of leasehold property must disclose the existence of onerous and unusual covenants, or at least afford the purchaser an opportunity of inspecting the leases.

An agreement for the sale of certain leasehold houses contained the following stipulation: "The vendor's title is accepted by the purchasers." The leases under which the property was held contained onerous and unusual covenants the existence of which had not been disclosed by the vendor before the contract was entered into, and of which the purchasers had no notice:—

*Held*, that the condition as to the acceptance of the title did not affect the vendor's general duty of disclosure, and the purchasers were entitled to rescind the contract and to have the deposit returned with interest.

THIS was a summons by the purchasers asking that the contract might be rescinded, and for a return of the deposit, on the ground that a good title had not been shewn to the property purchased.

By an agreement dated December 12, 1900, and made between the vendor of the one part and the purchasers of the other part, the vendor agreed to sell and the purchasers to buy ten leasehold houses, situate at Bromley-le-Bow, for the sum of 1475*l.*, and the vendor thereby acknowledged the receipt of a deposit of 75*l.*, and undertook to leave the sum of 1300*l.* on mortgage. The contract then proceeded as follows: "The vendor's title is accepted by the purchasers, who undertake to pay all costs of this transaction. The purchase is to be com-

pleted on or before the 24th day of January, 1901, when the purchasers will be let in possession of the rents, all outgoings to be apportioned on the day of completion."

Upon the abstract of title being delivered it was discovered that the leases under which the property was held contained the following covenants and obligations: (*a*) not to erect upon any part of the ground demised by the lease any buildings besides those already erected without the licence of the lessor; (*b*) a covenant not to make any alteration in the structural plan or elevation of the said premises, nor in any of the principal or bearing walls or timbers, without such licence as aforesaid; (*c*) a covenant not to carry on or permit upon the said premises or any part thereof any trade or business, but to use the said messuages strictly as private dwelling-houses and for private use and occupation only, and not to do or permit to be done any act or thing which might be or become a nuisance to the lessor or to the neighbourhood; (*d*) a covenant to deliver to the lessor or his solicitor an extract of all assignments of the property, and to pay a fee of 10*s.* 6*d.* therewith; (*e*) a proviso enabling the lessor to enter into possession of the said premises on the breach of any of the covenants contained in the leases.

Prior to the signing of the contract the purchasers were not informed of the covenants and obligations contained in the leases, and had no knowledge of their existence. Neither the leases, nor copies, nor abstracts thereof, nor extracts therefrom were produced to the purchasers before they entered into the contract.

By the requisitions the purchasers objected to the vendor's title on the ground that the leases contained various unusual covenants and obligations of which they had no notice when the contract was entered into, and claimed the right to rescind the contract, and to a return of the deposit with interest at 4 per cent.

The vendor declining to rescind the contract and return the deposit, this summons was taken out.

*Stewart-Smith*, for the summons. A vendor is bound to

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disclose to a purchaser what is within his own knowledge; he is bound to disclose the state of his title: *In re White and Smith's Contract.* (1) The purchasers are not bound to complete, as the leases are subject to onerous covenants of an unusual character, the terms of which they were not informed of nor had an opportunity of ascertaining for themselves before executing the contract: *Reeve* v. *Berridge.* (2)

*Alexander, K.C.*, and *E. Ford*, for the vendor. We submit that no order as asked for by this summons can be made. The covenants in the leases are no doubt unusual, but we rely on the contract and on the stipulation that "the vendor's title is accepted by the purchasers." In the face of that stipulation the purchasers cannot object to the title of the vendor. If the order asked for is made, it can only be by striking out that clause in the contract. Onerous covenants are an objection to title: *In re Davis and Cavey* (3); *In re Higgins and Hitchman's Contract.* (4)

*Stewart-Smith*, in reply.

*Cur. adv. vult.*

Aug. 10. BYRNE J. This is a purchaser's summons under the Vendor and Purchaser Act, 1874, asking, in effect, for a declaration that a good title has not been shewn, and for a return of the deposit. The substantial point raised by the applicants is that the property, which consists of ten leasehold houses, is subject to onerous and unusual covenants contained in the leases under which they are held, and to provisos for re-entry on breach of any of the covenants. I am of opinion that the leases do contain covenants which, in the absence of special stipulation or condition in the contract, would entitle a purchaser to say that a good title has not been shewn, inasmuch as the applicants were not informed and did not know that the leases contained any unusual covenants, nor were they afforded any opportunity of seeing the leases prior to signing the contract. It is, I think, now well established that, whether the sale be by private contract or public auction, it is the duty

(1) [1896] 1 Ch. 637.
(2) (1888) 20 Q. B. D. 523.
(3) (1888) 40 Ch. D. 601.
(4) (1882) 21 Ch. D. 95.

of the vendor to disclose the existence of onerous and unusual covenants contained in the leases of the leasehold property sold, or at least to afford the purchaser an opportunity of inspecting the leases: *Reeve* v. *Berridge* (1); *In re White and Smith's Contract.* (2) Undoubtedly also a purchaser may bind himself by a contract to accept a bad title, as, for example, if he chooses to contract to take such title "as the vendor has." In the present case the contract, which is very short, runs as follows, omitting the more formal parts; it refers to the ten leasehold houses with sixty years unexpired, let to weekly tenants at sums therein mentioned, and, after providing for the purchase-money and acknowledging the receipt of a deposit of 75*l.*, proceeds: "The vendor's title is accepted by the purchasers, who undertake to pay all costs of this transaction. The purchase to be completed on or before the 24th day of January, 1901, when the purchasers will be let in possession of the rents, all outgoings to be apportioned on the day of completion." The point is whether the stipulation that "the vendor's title is accepted by the purchasers" precludes them, under the circumstances, from insisting that a good title has not been shewn. I am not aware that the effect of the precise words used in the present case has ever been the subject of decision, although there have been cases where the effect of somewhat similar words has been discussed. It appears to me that, starting with the proposition that the vendor is bound to disclose the existence of such onerous covenants as exist in the present case, or, at least, to afford the purchaser an opportunity of examining the lease for himself, it requires more than a condition couched in such general terms as in the present case to bind the purchaser to take the title. As was said in *Bousfield* v. *Hodges* (3), "a purchaser is only bound by his acceptance of the title, so far as he is made cognizant of it, and . . . . if anything is kept back by the vendor, he is not, as to that, bound by his acceptance"; and in the case of *Jenkins* v. *Hiles* (4), which was referred to in *Bousfield* v.

(1) 20 Q. B. D. 523.
(2) [1896] 1 Ch. 637.
(3) (1863) 33 Beav. 90, 94.
(4) (1802) 6 Ves. 646; 6 R. R. 14.

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*Hodges* (1), Lord Eldon says (2): "Where the vendor is plaintiff, if the rule is founded in a principle of conscience, and requiring all possible security to be given to a purchaser, the Court will at least take care, that, where it is contended, that the defendant has waived his right to a reference, it shall be clear, that there was no surprise upon him, and that there has been a full and fair representation as to the title on the part of the plaintiff; not merely that representation, which a conscientious man would make after due diligence, but that, which a conscientiously diligent man would make. But, where from fraud or surprise on the part of the plaintiff there has been deficient information, the Court will take care, that a defendant shall never be surprised by the effect of a submission made upon want of full information." Lord Eldon was dealing there with a case of specific performance, but the same principles as to the necessity for full disclosure apply. I think the purchaser has a right to assume when a condition in the terms of that under discussion is inserted that the vendor has disclosed what it is his duty to disclose, and that the condition must be read as precluding objection upon that footing. It appears to me that the purchasers in this case are entitled to succeed, and, although not without some hesitation, I think I may also, as in the case of *In re Hargreaves and Thompson's Contract* (3), order the return of the deposit with interest and the costs of investigation of title.

Solicitors: *J. Howard Smith; Emanuel & Simmonds.*

(1) 33 Beav. 90, 94. (2) 6 Ves. 655.
(3) (1886) 32 Ch. D. 454.

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1899
FARWELL J.
*Nov.* 7, 8, 9, 10, 11, 13, 14, 15, 21.
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*March* 18, 19, 21, 22, 25, 26, 27, 28; *April* 1, 2; *Aug.* 9.

[1898 A. 891.]

*River—Navigable Non-tidal River—Public Right of Navigation—Power to Levy Tolls—"Toll"—"Toll thorough"—"Toll traverse"—Royal Charter—Validity—Construction—Grant of "Sole and exclusive Passage and Transit for Boats, &c.," through a River—Presumption of Lost Surrender—Permissive Statutory Powers—Implied Obligation—Power to erect "Stanch"—Authority to Levy Toll for Passage—Implied Obligation to Maintain and Repair—6 Geo.* 1, *c.* 29—*Practice—Powers of Court of Appeal—Variation of Judgment in favour of Respondent giving no Cross-notice of Appeal—Rules of Supreme Court*, 1883, *Order* LVIII., *r.* 4.

In the year 1618 the Crown granted to John Gason a patent for an invention for making rivers navigable by means of locks or sluices for the term of twenty-one years, with power to take during the term all profits accruing by means of any vessel passing or coming in or upon any river so made navigable by him. The patent prohibited all persons other than the grantee, his executors, &c., and licensees, from passing on any river so made navigable by him or from using the invention.

At the date of this patent the river Ouse from St. Neots to St. Ives was navigable only in sections, namely, between mill-dams, six in number, which were thrown across the stream, one at St. Neots, one at St. Ives, and the others at intermediate places.

Gason assigned his patent to Arnold Spencer, and before 1625 six locks had been erected on the river Ouse—one near to each mill-dam—upon channels connected with the river and cut through land belonging to or acquired for the purpose by Spencer, so that by means of those channels and locks boats could pass by water from St. Neots to St. Ives.

In 1628 Spencer obtained from the Crown another patent or charter. This charter contained a recital that Spencer had informed the King that by his invention and great charge the river Ouse from St. Ives to St. Neots had been made navigable, and that he intended at his own charge to make other rivers navigable. And the King thereby granted to Spencer, his executors, &c., full and free licence and authority, during a term of eleven years from July 21, 1628, to exercise within the realm the erecting of locks, &c., for making rivers navigable. And, for that the King was informed that Spencer had already made navigable the river Ouse from St. Ives to St. Neots, "the benefit whereof Spencer or his assigns now have or ought to have and enjoy," the King granted to Spencer, his executors, &c., as well all the benefit which he had received, or which he should or might receive, for or in respect of the river so made navigable by him, as also all such benefit as should or might accrue for or in respect

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of any river thereafter during the said term by Spencer or his assigns to be made navigable, to hold the said benefits from the end of the term of eleven years during the term of eighty years thence next ensuing.

There was a proviso that Spencer, his executors, &c., should not take for any vessel which should pass through any of the sluices any greater rate than (in effect) 3*d.* per ton. The grant reserved to the Crown a rent of 5*l.* per annum during the term of eighty years.

In 1638 Spencer obtained from the Crown another patent or charter by which the King, wishing that Spencer might receive adequate compensation for his great costs and expenses in carrying out these works, granted to him, his heirs and assigns, in perpetuity "(as much as in us lieth) the sole and exclusive passage and transit for boats . . . . and other vessels laden with corn, coal, and all other goods and merchandise" through all that river of Ouse leading from St. Ives to St. Neots, and also that Spencer, his heirs, &c., from time to time in perpetuity might and should have thenceforth for the future the sole licence and power of carrying, &c., in and through all the river aforesaid all food, coal, and merchandise in ships and other vessels ascending and descending, and also all profits whatsoever by reason of the carrying of any corn, &c., in and upon the river for the future in or upon all ships and other vessels whatsoever between the several towns and places aforesaid, yielding thereout annually to the Crown for the said passage in and upon the Ouse from St. Ives the sum of 6*l.* 13*s.* 4*d.* This patent contained no express grant of a right to take a "toll," nor did any of the patents expressly impose on the grantees any obligation to maintain or work the locks.

The rent of 6*l.* 13*s.* 4*d.* was regularly paid thereafter, but the rent reserved by the charter of 1628 was never paid. A toll of 3*d.* per ton had been for more than two centuries charged and paid for the passage of boats laden with merchandise through each of the six locks.

In an action brought in 1898 by the Attorney-General, at the relation of the county council of Huntingdonshire, and by the county council as plaintiffs, to establish on behalf of the public as against the defendant, the successor of Spencer, the right of passage along the river, including the locks, with boats and other vessels, subject as to boats laden with merchandise to the 3*d.* toll for each lock, and to establish an obligation on the part of the defendant to maintain the locks in an efficient state:—

*Held*, by Farwell J., that, under the charter of 1628, the locks were dedicated to the public for ever, and that a "toll traverse" was granted to Spencer for the term of eighty years for boats laden with merchandise, but that unladen boats were entitled to free passage:

*Held*, therefore, that the Crown had no power to grant the charter of 1638, and that that charter was invalid; that since the expiration of the term of eighty years the 3*d.* toll had been paid per incuriam, and that the public had a right of passage through the six locks without paying any toll, but that the defendant was not bound to maintain or to work the locks:

*Held*, by the Court of Appeal, that the charter of 1628 never had any effective operation, and that it must be deemed to have been merged in

the charter of 1638 or surrendered, and (per Stirling L.J.) that, if necessary, a lost surrender might be presumed:

*Held*, also, that the charter of 1638 was within the power of the Crown to grant and was valid, and that, though the word "toll" was not used in the charter, the public were entitled to pass through the locks on payment of a reasonable toll for boats laden with merchandise, but that unladen boats were entitled to free passage.

But, *held*, that the defendant was bound to maintain and to work the locks.

A Royal charter ought, if possible, to be so construed that it shall not exceed the powers of the Crown.

*Per* Vaughan Williams L.J.: There was sufficient evidence of the dedication of the river as a common highway by the riparian proprietors and others, and of the locks by the owners thereof, prior to the grant of the charter of 1638, and this state of things was clinched by the grant of that charter, whereby the Crown accepted the dedication.

But, at any rate, the defendant and his predecessors, who had paid to the Crown the rent reserved by that charter and had enjoyed the privileges conferred by it, including the collection of tolls, could not be heard to say that there was no public right to use the river on payment of the proper toll:—

*Held*, by Stirling L.J., that the charter of 1638 was in the nature of a grant of a franchise, and, by analogy to the cases relating to grants of a right of ferry, that the Crown had power to make such a grant.

By an Act, 6 Geo. 1, c. 29, passed in 1720, power was conferred on a predecessor of the defendant to construct a "stanch" in the river below St. Ives (at which point it was a public navigable river) and to repair and maintain the same, but no obligation was in terms imposed upon him. The Act contained a recital that the making, maintaining, and repairing of the "stanch" would necessarily be a great charge and expense to the grantee, his heirs and assigns, and it was enacted that it should be lawful for the grantee, his heirs and assigns, from and after the repairing or erecting the stanch, from time to time and at all times to demand and take for all goods which should be carried by boat or other vessel up or down that part of the river the tolls in the Act specified:—

*Held*, by Farwell J., that the public were entitled to passage by boats, &c., through the stanch, subject as to boats, &c., laden with goods to payment of the statutory toll, but that the defendant was not bound to maintain the stanch:

*Held*, by the Court of Appeal, that there was an implied obligation on the part of the defendant to maintain the stanch, and that, unless he did so, he could not levy the tolls.

The judgment at the trial of the action declared that the public were entitled to pass through the locks without paying any toll, and through the stanch on payment of the statutory toll, and that the defendant was not liable to maintain or work any of the locks or the stanch. The defendant appealed from the judgment, other than the latter part of the declaration. The plaintiffs gave no cross-notice of appeal:—

*Held*, that the Court of Appeal, while allowing the appeal to the extent

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of declaring that the defendant was entitled to a reasonable toll for passage of boats through the locks, had power also, under Order LVIII. r. 4, to vary the judgment in favour of the plaintiffs by declaring that the defendant was bound to maintain and work both the locks and the stanch, and the judgment was varied accordingly.

THIS action was brought by the Attorney-General, at the relation of the county council of Huntingdonshire, and by the county council as plaintiffs, against Leonard Taylor Simpson, to establish an alleged right on the part of the public to pass and repass with boats, barges, and other vessels through six locks or sluice pens on the river Ouse, between the towns of St. Neots and St. Ives, and also through a stanch on the same river situate a little below St. Ives, subject, however, as regarded the passage of boats and other vessels laden with goods or merchandise, to the statutory toll mentioned in the statute of 6 Geo. 1, c. 29, in respect of the passage through the stanch below St. Ives, and subject to the toll of 3*d.* per customary load in respect of the passage through each of the six locks above St. Ives; and, secondly, to establish an obligation on the part of the defendant to maintain all the six locks and the stanch in an efficient state and condition, and to provide attendants and all appliances necessary to work the same, and to enable the public navigating the river to have free and convenient passage through the same, subject only in the case of boats laden with goods and merchandise to the tolls aforesaid. The plaintiffs also sought to have the rights which they claimed enforced by means of an injunction.

The six locks in question were respectively situate at St. Neots, Offord, Brampton, Godmanchester, Houghton, and Hemingford Grey.

At the trial of the action by Farwell J. the learned judge upon the evidence arrived at the conclusion that "down to the year 1618 the river Ouse was not navigable in its entirety from St. Ives to St. Neots, but was navigable in sections," those sections being created by six mill-dams, which at the time of the action still existed, and were thrown across the river at points adjacent to the six locks in question. This conclusion was accepted by the Court of Appeal. The learned

judge also found that there had existed in some places at least a right of taking the goods from a boat, carrying them over a mill-dam, and then placing them in another boat so as to continue the transit. Farwell J. also found on the evidence that, regard being had to the fall of the river, it would have been impossible to navigate it between St. Neots and St. Ives if there had been no dams.

In Domesday Book mills were mentioned as then existing at or near the places at which the locks were afterwards constructed, and from this it was inferred that there must also then have existed mill-dams.

The Hundred Rolls and Quo Warranto Rolls relating to inquisitions made in the reign of Edward I. were also adduced in evidence.

Reference was also made to a deed dated November 10, 1467, between the Abbot of Ramsey of the one part, and the townships of Godmanchester and Huntingdon of the other part, by which the abbot granted to the town of Godmanchester free passage in the river with ships, boats, and all manner of vessels, more or less as the river might bear, in all places to come from the town of Huntingdon to a bank nigh one of the said mills called the drawing place, and there to be discharged of their carriage and lay it on the said bank, and draw over the said bank the said vessels to be pulled over and so shoven forth again beneath the said excluses, and there in all convenient and goodly haste be discharged again without paying anything therefor. The effect of this deed and the other evidence as to the early history of the river are stated in the judgment of Farwell J.

In the year 15 Jac. 1 (1618) the King granted a patent to John Gason, who had represented himself as having "attained to the skill, knowledge, and perfection of a more apt, commodious, and beneficial means for and concerning the framing, contriving, and making of locks, sluices, bridges, cuts, cranes, mills, dams, and other inventions and additions most fit, necessary, and convenient for grinding of corn, raising of water, making of rivers, streams, and waters navigable and passable for boats, keels, and other vessels to pass from place to place,"

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not yet used within the realm. By this instrument the King granted full, free, and absolute licence, power, authority, and privilege to Gason, his executors, administrators, and assigns, and licensees, that he and they might to his and their own proper use, benefit, and behoof in (amongst others) any rivers, streams, waters . . . . and places whatsoever and wheresoever within the realm for the period of twenty-one years from the date of the patent, devise, . . . . make perfect, exercise, practise, put in use and use . . . . all manner of locks and sluices and other inventions for (amongst other things) making of rivers, waters, and streams navigable and passable, and also to use and invent all manner of engines, tools, and instruments and inventions for the perfecting and performing the premises or any part thereof. There was also granted, not only full and absolute power and authority to take and receive to his and their own proper use all manner of contribution, advantage, and commodity which should during the term be by any of His Majesty's subjects agreed upon for or in respect of the making, setting up, or inventing of any sluices, dams, or locks, and other inventions made, set up, or devised by the patentee upon any stream, water, or place whatsoever within the realm, without let by the King, his heirs or successors, and without any account to be rendered to him or them (except as provided), but also to have, take, and receive all manner of profit which by any means should accrue by means of any vessel or boat which should pass, come, or sail in, upon, or to any river, stream, or water so to be made navigable, as also of any sluices and all and singular the premises aforesaid, without let and without account. The patent prohibited all persons other than the patentee, his executors, administrators, and assigns, and persons who should give contentment or agreement to him, to attempt or presume, directly or indirectly, to pass, sail, go, or remain to, at, or upon any rivers, streams or waters made navigable by the patentee, or exercise or use the patented invention, and it contained a proviso enabling the King to revoke the patent, if upon examination had before six or more of the Privy Council they should declare in writing that the patent was inconvenient to the realm.

The patentee assigned his patent to two persons named Spencer and Girton. Spencer survived Girton, and, having become sole owner of the patent, he assigned it to John Jackson. Before 1625 six locks or sluices (being those in question in this action) had been constructed on the river Ouse. Each of them was constructed upon a channel connected with the river, and cut at the side of a mill-dam through land which had been acquired by Spencer or Jackson, so that by means of these channels and the locks boats could pass by water from St. Neots to St. Ives. Complaints were made to the Privy Council that Jackson claimed exorbitant tolls for the use of these locks, and inquiry was made into these complaints by the Council, but the proceedings came to nothing.

A suit of *Thelwall* v. *Jackson* was in 1628 instituted in Chancery to establish a right on the part of the public to use these sluices or locks on the payment of a reasonable toll; but, although in the course of the proceedings an injunction was granted, this was afterwards dissolved, and Jackson was (in the language of an order dated June 16, 1632) "left at liberty to take his remedy at the common law," or (according to a later order of February 16 following) "to go on with the work and to make what he can thereof."

In this state of things Spencer obtained from the Crown a charter dated January 3 of the third year of King Charles I. (162$\frac{7}{8}$). It contained a recital that Spencer had informed the King that by his order, direction, invention, pains, and exceeding great charge the river of Ouse leading from St. Ives to St. Neots had been made navigable, and that he intended at his own charges to make other rivers, streams, and waters navigable and passable for boats, keels, and other vessels to pass from place to place, which had not theretofore been practised or put in use by any others within the realm. The charter contained a grant by the King to Spencer, his executors, administrators, and assigns, of full and free licence, power, privilege, and authority during a term of eleven years from July 21 then next (i.e., July 21, 1628) to exercise, practise, and put in use in all convenient places within the realm the cutting, contriving, erecting, setting up, perfecting, and

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making all manner of locks, sluices, bridges, cuts, dams, and other inventions not repugnant to the laws of the realm for making of rivers and streams navigable and passable. After a series of clauses framed for giving effect to this grant, it proceeded as follows: "And for the better encouragement of the said Arnold Spencer, his executors, administrators and assigns, to proceed in so laudable a work with effect, and for that we are informed that the said Arnold Spencer hath already made navigable the said river of Ouse leading from St. Ives to St. Needs (otherwise St. Neots) in our county of Huntingdon, the benefit whereof the said Arnold Spencer or his assigns now have or ought to have and enjoy, know ye further that we, for the considerations aforesaid, of our more abundant grace, certain knowledge and mere motion, are graciously pleased to give and grant unto the said Arnold Spencer, his executors, administrators and assigns, as well all the benefit which he hath received or which he shall or may receive for or in respect of the said river so by him the said Arnold Spencer made navigable as aforesaid, if the same were so done by the said Arnold Spencer or at his charge as is alleged, as also all such benefit as shall or may accrue or grow payable for or in respect of any river hereafter during the term aforesaid by him the said Arnold Spencer, his deputies or assigns, to be made navigable, according to the limitations and provisions before in these presents expressed, to his and their own proper use and behoofe, without any account or other thing whatsoever unto us, our heirs or successors, other than the rent hereinafter in these presents reserved, to be rendered, paid, yielded or done, to have and to hold the said benefit of the said river of Ouse made navigable as aforesaid, and all the profit and benefit of all the rivers by him the said Arnold Spencer, his executors, administrators and assigns, to be made navigable within the term of eleven years aforesaid, and all and singular the premises last before mentioned to be granted to the said Arnold Spencer, his executors, administrators and assigns, from the end and expiration of the said term of eleven years for and during and unto the full end and term of fourscore years from thence next ensuing and fully to be complete and ended."

There was a proviso that Spencer, his executors, &c., proceed not to take for any such boat or other vessel which should pass or go through any of the said sluices any greater rate or rates upon the ton than was to be paid or was formerly granted by the King's late father unto the aldermen and burgesses of the town of Stamford for boats and vessels passing from the sea to Stamford, and from Stamford to the sea. The toll granted to Stamford was 3*d.* per ton per lock. The grant to Spencer contained a reservation to the Crown of a rent of 5*l.* per annum during the term of eighty years.

Upon the evidence the Court of Appeal came to the conclusion that this rent had never been paid. The exact date at which the assignment by Spencer to Jackson was made did not appear, but, from the proceedings in the Privy Council already mentioned, it appeared that on June 20, 1627, Jackson was the owner of Gason's patent and of the sluices which had been erected on the river Ouse by virtue of it, and he was in 1628 still the owner of the patent and the sluices. It was stated that he remained the owner for about seven years, though the precise date at which he ceased to be the owner did not appear. It was, however, conceded that his ownership had come to an end before 1638, and that on the cesser of his ownership Spencer again became the owner of the patent and the sluices.

On December 11, 1638 (14 Car. 1), Spencer obtained from the Crown the grant of another patent or charter of that date. This charter contained a recital that Spencer had informed the King that, by virtue of letters patent to him bearing date January 3, 3 Car. 1, he had made navigable and passable the river Ouse from St. Ives to St. Neots, and thence to within four miles of Bedford, to the ease and benefit, not only of the inhabitants of the counties of Huntingdon and Bedford, but also of other counties adjoining the said river, and had besought the King to grant to Spencer, his heirs and assigns, the sole benefit of all and singular the water-carriage in and upon the river Ouse from St. Ives to St. Neots, and so far as Spencer, his heirs and assigns, should make the same river further navigable, and the charter then proceeded as follows: "We therefore wishing that the said Arnold Spencer may receive adequate

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and ready compensation and reasonable satisfaction for his great costs and expenses in carrying out these works, know ye that . . . . for the reasons aforesaid and in consideration of the yearly rent hereinafter in these presents reserved, we have given and granted, and by these presents for us our heirs and successors give and grant to the said Arnold Spencer, his heirs and assigns (as much as in us lieth), the sole and exclusive passage and transit for boats, barges and other vessels laden with corn, coal and all other goods and merchandise through all that river or trench of Ouse aforesaid leading from the town of St. Ives aforesaid to the said town called St. Neotts in our said county of Huntingdon, and thence to within the said four miles of our town of Bedford in our county of Bedford, and so much farther as the said Arnold Spencer, his heirs or assigns, shall hereafter make or cause to be made the said river navigable. . . . We have also given and granted, and by these presents for us our heirs and successors give and grant, to the said Arnold Spencer, his heirs and assigns, that the said Arnold Spencer, his heirs and assigns, from time to time in perpetuity may and shall have henceforth for the future the sole and exclusive licence and power of carrying and recarrying, transporting and retransporting in and through all the river aforesaid from the said town of St. Ives aforesaid to the said town called St. Neotts, and thence to within the said four miles of Bedford aforesaid, and so much farther as the said Arnold Spencer, his heirs or assigns, shall make or cause to be made the said river navigable. . . . All and all manner of food, coal, goods and merchandise whatsoever in ships, boats, barges and other vessels ascending or descending; and also the sole and exclusive government and disposition of all and all manner of the same ships, barges, boats and other vessels whatsoever sailing or navigating in and upon the said several rivers or trenches between the towns and places aforesaid; and also all and all manner of profits, commodities, pre-eminences, rights and privileges whatsoever by reason of the drawing, redrawing or carrying or recarrying of any corn or coal, wood, underwood, or any other merchandise, goods or chattels of whatever kind, as well all native as foreign kinds, in and upon the said several

rivers or trenches for the future in or upon all and all manner of ships, barges, boats and other vessels whatsoever between the several towns and several places aforesaid, and the same to load and unload in any place or places at pleasure. . . . To have, hold and enjoy the said several passages and transits through the said river of Ouse from St. Ives aforesaid to St. Neotts aforesaid in our said county of Huntingdon, and thence to within four miles of the said town of Bedford, and so far beyond the said four miles or any part thereof as the said Arnold Spencer, his heirs or assigns, shall make the said river leading from St. Ives aforesaid further navigable . . . . and all and all manner of profits, commodities, advantages, and emoluments whatsoever by reason or on account of the carrying or recarrying of all and any goods of whatever kind in and upon the said several rivers or trenches in any ships, barges, boats or other vessels as aforesaid. To the said Arnold Spencer, his heirs and assigns, to the only proper use and benefit of the said Arnold Spencer, his heirs and assigns, for ever, yielding throughout annually to us, our heirs and successors, for the said passage in and upon the said river of Ouse from St. Ives aforesaid six pounds thirteen shillings and fourpence. . . . And we further will and by these presents for us, our heirs and successors, command and order that no other person or persons at any time in future after the date of these our letters patent with ships, boats, barges and other vessels of whatsoever burden or kind in any part or parcel of the said several rivers or trenches aforesaid for the carriage of any food, coal, wood, underwood, goods or merchandise shall presume to enter upon or navigate or do or attempt any other thing in the several rivers or trenches aforesaid, or in any members of the same rivers or rivulets, or the banks, ways, ditches, or fences to the said rivers or trenches respectively appertaining or belonging, which may be to the injury or prejudice of the said Arnold Spencer, his heirs or assigns, without the licence and wish of the said Arnold Spencer, his heirs or assigns; and to the said Arnold Spencer, his heirs and assigns, we grant licence by these presents that he, his heirs and assigns, with all and any vessels or ships in and through

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the river or rivulet of Ouse aforesaid down from the said town of St. Ives . . . . or in any part or parcel of the same river from time to time as often as they shall think fit may navigate and pass at the pleasure of them, or any of them, as freely and lawfully and in as ample a manner and form as any other or others of our subjects heretofore have been accustomed or have used or enjoyed or ought to have done."

This charter granted also to Spencer rights in respect of the river Stour in Suffolk and Essex similar to those granted to him in respect of the Ouse. This explains the use in the charter of the words "the several rivers," &c.

The rent of 6*l.* 13*s.* 4*d.* reserved by the charter of 14 Car. 1 had been regularly paid ever since it was created.

On September 12, 1676, the corporation of Godmanchester granted to Henry Ashley, the elder, a lease of the sluice or lock at Godmanchester for the term of nineteen years from Lady Day then last past at an annual rent of 5*s.* The lease contained a covenant by the lessee and an agreement similar to the covenant and agreement next hereinafter stated as being contained in a deed of December 3, 1689.

By the deed of December 3, 1689, the corporation of Godmanchester, in consideration of 120*l.*, conveyed the Godmanchester Lock (subject to the lease to Henry Ashley, the elder), to Henry Ashley, the younger, in fee. The deed contained a covenant by Henry Ashley, the younger, that he would maintain and uphold the lock, and that it should be lawful for the miller of Godmanchester for the time being, and in his default for such persons as should be thereunto appointed by the corporation, upon every likelihood and appearance of any flood of waters, to set open and to keep open the gates of the aforesaid sluices and other sluices until the waters should be fallen and the floods well abated, and also that it should be lawful for the freemen of Godmanchester to have free passage through the sluices in Godmanchester and other sluices with boats laden with their goods for their own proper use, or with goods for any public use within the borough.

Henry Ashley, the elder, afterwards attorned tenant to Henry Ashley, the younger.

The rights of Spencer under the charter of 1638 became after his death vested in his two granddaughters, Anne, the wife of John Jemmatt, and Elizabeth, the wife of Nathaniel Jemmatt, in equal moieties. Henry Ashley, the elder, purchased Elizabeth's moiety, and he was also lessee of both moieties for the term of twenty-one years from 1674, at the yearly rent of 160*l.* In a suit in the Court of Chancery brought by John Jemmatt and his wife against Henry Ashley, the elder, the Court, by a decree dated July 2, 1690, established as against the defendant that the plaintiffs' rights in respect of the river extended up to Barford Bridge, which was situate between St. Neots and Bedford. The defendant had claimed rights adverse to the plaintiffs in respect of the river between St. Neots and Barford Bridge. This decree was affirmed by the House of Lords on January 17, 1693.

In another suit—*Jemmatt* v. *Ashley, the Younger*—commenced in 1695, after the expiration of the lease to Henry Ashley, the elder, the same plaintiffs claimed to be entitled to one moiety of the locks and the tolls payable under the charter of 14 Car. 1, and alleged that the defendant was entitled to the other moiety, but that the latter laid claim to the whole of the locks and had forbidden the defendant Wilkes and several other traders to pay the plaintiffs any of the tolls. Both defendants denied the existence of the charter. The defendant Wilkes further said that, if any such patent was granted, it was against law and void, and was never enjoyed or put in execution; but he admitted that between St. Ives and St. Neots there were six ancient sluices belonging to the proprietors of the soil on which the sluices were built, and that an ancient toll of 3*d.* per ton of goods had from time out of mind been paid for each sluice, and that he was ready to pay to the plaintiffs such toll or so much as the plaintiffs might make out a title to. The decree, dated July 20, 1696, declared the plaintiffs entitled to one moiety of the navigation of the river Ouse and the profits thereof both up and down the river between Barford Bridge (four miles from Bedford) and St. Ives, and directed an account of what was due from Wilkes, and that a moiety thereof be paid to the plaintiffs, and the other moiety to the defendant Ashley

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"after the rate of 3*d.* per chaldron load weight or tunn at or for every work by means whereof all goods, &c., pass up and down the said river between St. Ives and Great Barford Bridge."

In the year 1720 an Act (6 Geo. 1, c. 29) was passed intituled "an Act for preserving and improving the navigation of the river Ouse, in the county of Huntingdon." This Act contained a recital that "the river Ouse, which runs through the counties of Huntingdon and Bedford, is become so shallow at or near St. Ives, and other places in the said county of Huntingdon, that by reason thereof, and by reason of the decay of a certain work formerly built and standing in the said river below St. Ives, commonly called St. Ives stanch, boats and lighters cannot pass up the said river to St. Ives aforesaid, much less higher up the said river, as they used to do, except it be in times of flood or high waters, to the great loss and detriment, not only of the town of St. Ives aforesaid, but likewise the counties of Huntingdon and Bedford, and other adjacent counties, which used to be supplied with coals, and other commodities, by means of the navigation of the said river." And it was enacted "that Henry Ashley of Eaton Socon, in the county of Bedford, Esquire, his heirs and assigns, shall be and are hereby impowered and authorized to repair, amend, meliorate and improve the passage for boats, lighters, and other vessels on the said river, within the said county of Huntingdon, and to make the same better, and more perfectly navigable, from a place called Hollowell in the said county, to every such other place or places higher up the stream of the said river, and within the said county, to which the same was or is navigable in times of full waters, and being within its usual banks; and for that purpose to cleanse, scour, and deepen the said river at the said place called Hollowell, and at all and every other place and places higher up the stream of the said river, and within the said county, where and as often as occasion shall require; and to repair and rebuild (in such manner as he or they shall think fit) the said work called St. Ives stanch, and, from time to time, to repair, use, and maintain the same; and to build, erect, and make over, or in the said river near the place where

the said stanch did formerly stand, such other new work or works as they shall think fit or convenient, for effecting the purpose or undertaking aforesaid, and, from time to time, to repair, amend, maintain, use, or alter the same, as occasion shall require."

There was this further recital: "And forasmuch as the making, maintaining and repairing the said stanch, or other work or works, herein or hereby aforementioned or authorized to be made, maintained and repaired by the said Henry Ashley, his heirs and assigns, will necessarily be a great charge and expense to the said Henry Ashley, his heirs and assigns." And it was further enacted, "that it shall and may be lawful to and for the said Henry Ashley, his heirs and assigns (and no others), from and after the repairing, building or erecting the stanch aforementioned, or other work or works near the same, from time to time, and all times, to demand, receive, and take, to his and their own proper use and behoof, over and above the toll due or payable before the making of this Act, for all and every the goods and commodities which at any time or times, after the repairing, building or erecting the said stanch or other work or works near the same, shall be carried by boat, lighter, or other vessel, up or down, or upon that part of the said river, between Hollowell and St. Ives aforementioned, the several rates and tolls hereinafter mentioned."

Then followed a schedule of tolls. And it was finally enacted that—"this Act shall be taken and allowed in all Courts within this kingdom, as a public Act; and all judges, justices, and other persons, are hereby required, as such, to take notice thereof, without special pleading the same."

The Act did not expressly impose on Ashley any obligation to maintain and repair the stanch.

The tolls authorized by this Act had been ever since levied in respect of passage through the stanch. A toll of 3*d.* per customary ton had for more than two centuries been charged and paid for the passage of boats and other vessels carrying goods through each of the six locks, namely, not only during the term of eighty years mentioned in the charter of 3 Car. 1, but after the expiration of that term; and this payment had continued

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until shortly before the commencement of the present action in 1898. Attempts had been made in recent years to compel the payment of a toll for pleasure-boats passing through the locks, but this demand had been resisted. No toll had ever been taken for unladen barges. The defendant had in 1893 acquired the rights of Spencer under the charters, and also the rights of Ashley under the Act of 1720.

The river was tidal up to St. Ives stanch, and not beyond, and it was a public navigable river below the stanch.

In 1894 an action was brought by the defendant Simpson against the corporation of Godmanchester, in which he sought to restrain the corporation from trespassing upon, forcing open, or otherwise interfering with or injuring the Godmanchester, Houghton, and Hemingford Locks, or any of them. In this action the validity of the right or easement claimed by the corporation to have the locks opened in times of flood was established: vide *Simpson* v. *Godmanchester Corporation.* (1)

The above statement of facts is mainly taken from the written judgment of Stirling L.J.

1899. Nov. 7, 8, 9, 10, 11, 13, 14, 15. *Upjohn, Q.C., Neville Tebbutt,* and *Brooke Little,* for the plaintiffs.

*Neville, Q.C.,* and *R. J. Parker,* for the defendant.

*Cur. adv. vult.*

1899. Nov. 21. FARWELL J. The Attorney-General (at the relation of the county council of Huntingdon), and the county council of Huntingdon as plaintiffs, seek to establish against the defendant a public right of navigation on the river Ouse from St. Neots to St. Ives, coupled with a liability on the part of the defendant to maintain and work certain locks and a stanch. The distance between St. Neots and St. Ives is about sixteen miles, and there is a fall in that distance of about twenty-eight feet, and this part of the river is non-tidal. The plaintiffs assert that the river is and has been time out of mind a public navigable river, and on this basis they also assert that the defendant is liable—by reason of certain patent grants and

(1) [1896] 1 Ch. 214; [1897] A. C. 696.

an Act of Parliament, to which I shall have hereafter to refer—to maintain and work six locks—namely, St. Neots, Offord, Brampton, Godmanchester, Houghton, and Hemingford Grey—which all stand on practically the same footing, and a stanch at St. Ives, to which different considerations apply. The first issue which I have to determine is, whether the river is and has been from the earliest times, or, at any rate, a time anterior to the grant of the patent rights, a public navigable river. Now, the question whether a non-tidal river is navigable or not depends, not on the question of possibility of navigation, but on the proof of the fact of navigation. If the fact be proved, then the channel of the river is the King's highway, and as such is open to the free passage of all the subjects of the Crown: see *Williams* v. *Wilcox* (1), *Nottingham Corporation* v. *Lambert* (2), and Hale, De Jure Maris (Stuart Moore's History of the Foreshore, p. 374).

In referring to Hale, I refer to the reprint of his treatise in Mr. Stuart Moore's book on the History of the Foreshore. To use the words of Lord Hale, "As the common highways on the land are for the common land passage, so these kind of rivers, whether fresh or salt, that bear boats or barges, are highways by water; and as the highways by land are called altæ viæ regiæ, so these publick rivers for publick passage are called fluvii regales, and haut streames le Roy; not in reference to the propriety of the river, but to the publick use; all things of publick safety and convenience being in a special manner under the King's care, supervision, and protection." It is important, for reasons which will appear subsequently, that I should qualify the generality of the foregoing statement by saying that the analogy between high road and navigable river is not complete, inasmuch as there is no one on whom any duty is imposed by the common law to do on a navigable river that which would be analogous to the ordinary repair of a highway, namely, clear away sandbanks, and preserve and maintain the channels: see *Williams* v. *Wilcox*. (1)

A quantity of evidence has been adduced on this issue, and

(1) (1838) 8 Ad. & E. 314, 329; 47 R. R. 595.
(2) (1738) Willes, 111, 114.

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it is impossible for me, within the reasonable compass of a judgment, to dissect and comment on it in detail. I can only state its nature in general terms, and give my reasons for the conclusions at which I have arrived in respect of it.

The earliest document put in is Domesday Book, tendered by the defendant. With regard to this, I would only say there can be no doubt that there were mills upon the river in the time of Domesday, and that those mills were water-mills, because as a matter of history windmills were not introduced into England before the twelfth century. It is also plain that all those mills must have had dams in order to be worked. There is, however, nothing to shew where the mills were situate; and I therefore gain very little assistance from this document. The plaintiffs rely on the statements contained in certain inquisitions appearing on the Hundred Rolls, made in the reign of Edward I. These inquisitions were held by Edward I. on his return from the Holy Land in the second year of his reign, with the object of ascertaining whether any wrong had been done to the King or to his subjects during his absence. They were made by special commissioners appointed for the purpose upon the oath of a jury of every hundred and town affected by the inquisition—that is to say, by men who may be deemed to have had a special local knowledge.

The Statute of Gloucester was passed in the sixth year of the reign of King Edward I., and the first chapter, relating to liberties, franchises, and quo warranto, was founded on these inquisitions, and on the circuit of the judges next after the passing of the Statute of Gloucester. Writs of right and quo warranto were issued against such persons as had made claims in cases where the jurors had previously said upon oath before the inquisitors nesciunt quo warranto, or where they had said the claim was sine warranto: see Introduction to Hundred Rolls by the Deputy Keeper of Records in the Tower. It is obvious, then, that the inquisitions and the quo warranto do not amount to any decision; but they are admissible as reputation in a question of public right such as the present, and are entitled to consideration from the local knowledge of the deponents. But their weight in the present case is to some

degree affected by the interest which the deponents obviously had in the matters to which they depose. The short effect of the presentments is, that the jurors assert that ships and boats were wont to come up the river, and that their passage had been obstructed by the mills, stanches, and weirs of Reginald de Grey, the Abbot of Ramsey and the Prior of Huntingdon. But there the matter ends; no judgment appears to have been taken in any of these cases, and although I think it plain that there was public navigation between mill-dam and mill-dam, the evidence, so far as a free passage throughout from St. Neots to St. Ives is concerned, is, to my mind, against the plaintiffs. It is plain that the question was mooted and the claim was made, but the obstructions nevertheless remained, and were not in fact removed.

This conclusion is fortified by a deed of November 10, 1467, between the Abbot of Ramsey of the one part and the townships of Godmanchester and Huntingdon of the other part, and sealed with the seal of the Duchy of Lancaster. Passing over the recital that the abbot and his predecessors had been possessed of the mills, dams, and excluses out of time of mind (which may not be evidence against the plaintiffs), the abbot grants to the town of Godmanchester free passage on the river, with ships, boats, and all manner of vessels, more or less as the river may bear, in all places to come from the town of Huntingdon to a bank nigh one of the said mills, called the drawing place, and there to be discharged of their carriage and lay it on the said bank, and there over the said bank the said vessels to be pulled over, and so shoven forth into the said river again beneath the said excluses, and there in all convenient and goodly haste be charged again without paying anything therefor.

This deed gives a good and graphic picture of this part of the river in the fifteenth century. There was a dam. Ships were unladen and drawn over there at a place which had been so long used for the purpose as to be known as the "drawing place," and were then loaded up again and sent on their way. There was no general right in the public, for the grant of this limited right is wholly inconsistent with the

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existence of a general public right. Further, in the reign of Henry VII. it appears, from a decree made by the County Palatine Court at the suit of the Abbot of Ramsay, that the inhabitants of Godmanchester had broken the flood-gates of the mills at Houghton, and afterwards submitted to restore them and make their peace with the abbot; and, further, orders were made in the same Court in the seventh year of Henry VIII. If these flood-gates had been obstructions in a public navigable river, the inhabitants would have been justified in abating them. In the sixth year of James I. an inquisition was taken at Huntingdon which contains various allegations which point to the existence of an ancient right of passage; but little reliance can be placed upon this, for not only was no action taken to give effect to the representation, but the patent grants I have mentioned were shortly afterwards made in order to render the river navigable throughout, and they proceed on the assumption that it was not then so navigable. The plaintiffs' counsel lay great stress on a statement in the Huntingdon Inquisition that the sluices of the Prior of Huntingdon "are open when it may be necessary for those passing." But I cannot attach much weight to an act (assuming it to be proved) which may have been an act of grace or for valuable consideration, or merely at the caprice of the prior at that time.

The result is that I find as a fact that down to the year 1618, which has been treated by counsel as the first period for consideration, the river Ouse was not navigable in its entirety from St. Ives to St. Neots, but was navigable in sections—that is to say, from St. Ives to Hemingford, from Hemingford to Houghton, and so on up to St. Neots. Having regard to the fall of the river, I think it would have been impossible to navigate it between St. Neots and St. Ives if there had been no dams. The effect of damming back the water by the various locks was to make a succession of reaches of the river navigable, with the right, in some places, at any rate, if not in all, of "drawing over" in order to continue the transit. This conclusion is adverse to the plaintiffs, because the public way ceases in each instance at the spot

at which they claim their right. But the view that I have expressed appears to me to be consistent with all the documents, and to be in accordance with what one would expect in days when each town had its own separate government, and public rights in the modern sense were little understood; and in this connection I would refer to Hale's De Jure Maris (Stuart Moore's History of the Foreshore, p. 374), who, in speaking of public rivers, describes them as "common highways for man or goods or both from one inland town to another."

I have now to consider the effect of the three grants by letters patent, dated respectively 1618, 1628, and 1638, having regard to the fact that I have already found that down to 1618 the river Ouse was not a public navigable river throughout, but only by sections—i.e., from mill-dam to mill-dam.

[His Lordship stated the effect of the patent of 1618, and continued:—]

In my opinion this patent operated solely as an inventor's patent, and created no toll of any sort or description. It would expire in 1639. It appears from the Privy Council's Registers of December 5, 1625, that under this patent sluices had been erected on the Ouse from St. Ives to St. Neots by Arnold Spencer and John Jackson, and that unreasonable tolls were complained of as being taken in respect thereof by John Gason and his assigns of his patent. Various inquiries and proceedings ensued upon this, which I need not discuss. The important point relied upon by the plaintiffs is that the sluices appear to have been made, and the river therefore to have become navigable throughout before 1625.

[His Lordship stated the effect of the patent or charter of 1628 (3 Car. 1), and continued:—]

It is to be observed that the second patent was granted during the continuance of the first, and for an immediate term coextensive with the residue of the first. It is not easy to understand now how this came about; but the inference which I draw is that at the date of the second patent Spencer had by some means become entitled to the benefit of the first patent, and that the second patent was in aid of the first. This second

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patent differs from the first inasmuch as it creates a toll. In my opinion it first creates a monopoly, analogous to a modern patent for invention, for the term of eleven years, and then proceeds to grant a toll, not merely for the term of eleven years, but also for the term of eighty years after the expiration thereof. In effect, the inventor is repaid, not by the purchase-money of his invention, but by the creation by the Crown of a toll. That this is the true construction of the patent is, I think, borne out by the consideration that the Statute of Monopolies (21 Jac. 1, c. 3) had been passed only five years before, under which the Crown could not grant a monopoly for a new invention for a longer term than fourteen years. The question which has been argued on this patent is whether a toll has been thereby created, and, if so, whether it is toll thorough or toll traverse. Toll thorough is toll for passing over the King's highway, and cannot be lawfully granted without consideration to the public. The power of the Crown to grant such a toll is limited. It is an exercise of the Royal prerogative, and the King's prerogative stretches not to the doing of any wrong: see *Attorney-General* v. *Parmeter*. (1) The Crown, therefore, cannot grant toll for passing over a public highway without consideration, or so as to extend or be taken beyond the place where such consideration arises: *Brecon Market Co.* v. *Neath and Brecon Ry. Co.* (2) Such a consideration need not be expressed, but has often been implied; for example, the grant of a ferry, with the right to take tolls for the use thereof, implies the liability to maintain the ferry and keep a ferry-boat ready for use. The implication of the liability is necessary to support the validity of the grant: see *Huzzey* v. *Field*. (3) Toll traverse, on the other hand, is toll taken for passing over the land of the grantee of the toll; the use of the land is sufficient consideration, and no other consideration need be implied. I use the term "toll traverse" with reference to a toll the title to which is severed from the ownership of the

(1) (1811–3) 10 Price, 378, 412; 24 R. R. 723, 745.

(2) (1872) L. R. 7 C. P. 555, 566.

(3) (1835) 2 C. M. & R. 432; 41 R. R. 755.

land over which the road in respect of which it is charged passes. A landowner can, of course, make what bargain he pleases with persons who desire to cross his land; but he cannot create and reserve to himself a legal toll on land which he dedicates to the public. I think the statement in Hale (Stuart Moore, History of the Foreshore, p. 376) is correct: "No man can take a settled or constant toll even on his own private land for a common passage without the King's licence." It is essential to toll traverse that the reservation of the toll should be contemporaneous with the dedication to the public: see *Lord Pelham* v. *Pickersgill*. (1) It appears that the lands on which the various locks were made were acquired by the patentees for the purpose; the evidence on this head is meagre, but of the oral evidence I prefer the testimony of Mr. Thornber to that of Mr. Wheeler, and I am confirmed in this by the consideration that it would have been practically impossible to cut through the dams, which would have been the only other way of making the locks. I am asked to infer from the statement in the petition of 1625, and in the patent of 1628, that Gason or Jackson or Spencer had already made the Ouse navigable, and had, therefore, dedicated the river to the public before the date of the second patent. I cannot so hold. If this had been done, I cannot see how he could afterwards have had any benefit of the first patent. That patent granted no toll, and, if an inventor chooses to put the subject-matter of his invention on a public highway, he has no means by which he can afterwards compel the public to pay him for it. For instance, if the patentee of a new form of wood pavement paved a street in London with his patented article, he would find it impossible to obtain from the public any payment for the use of the patented article. But the second patent expressly states that Spencer "now has or ought to have" the benefit to be obtained from the fact that the river Ouse has been made navigable from St. Ives to St. Neots. The only way in which he could have this benefit would be by requiring payment for the use of his invention on his own land. This is borne out by an order of November 27, 1632,

(1) (1787) 1 T. R. 660; 1 R. R. 348.

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in *Thelwall* v. *Jackson*, by which Jackson was left at liberty to take as he shall please and make the best of the passage—an order wholly inconsistent with the existence of a public right of way through the passage. And the case of *Juxon* (or *Jackson*) v. *Thornhill* (1) corroborates this; for the objection was there raised on this very patent that the Ouse was a common river, and the Court decided in the plaintiff's favour on the ground that the locks were on his own land. Moreover, the expression that the patentee had made the Ouse navigable is ambiguous; it may well, and I think it does, mean "capable of navigation" only, as distinct from "dedicated to the public for the purpose of navigation."

But the patent of 1628 gives rise to different considerations. This patent does not merely grant the ordinary inventor's rights, but creates a toll for a period far exceeding any legal term under the Statute of Monopolies. This, coupled with the fact that the water of the Ouse had been diverted in some measure to give effect to the patent, leads me to infer that the locks were dedicated to the public contemporaneously with the grant of the toll. On this point I refer to Hale (Stuart Moore, History of the Foreshore, p. 375): "So likewise if he" (that is the owner of a private channel) "purchaseth the King's charter to take a reasonable toll for the passage of the King's subjects, and puts it in use, these seem to be devoting and as it were consecrating of it to the common use." It has been argued that there can be no dedication of a highway subject to a toll, and this may well be in the case of an individual attempting to create a toll for himself as against public bodies having the care of highways: see *Austerberry* v. *Oldham Corporation*. (2) In addition to the difficulty which I have already stated, that a subject cannot create toll traverse properly so-called without a grant from the Crown or an Act of Parliament, dedication requires, not merely the intention to dedicate by the grantor, but an acceptance by the public authority, because the latter by acceptance comes under a liability to keep in repair. I have already pointed out that a river differs in this respect

(1) (1629) Cro. Car. 132. (2) (1885) 29 Ch. D. 750.

from a highway. The further difficulty that an individual cannot create a toll traverse does not apply to the present case, and, if authority is needed, in my opinion the legal possibility of the creation of a toll traverse by the Crown, and a contemporaneous dedication by the owner of the land subject to the toll to the public, is shewn by the judgment of Willes J. in the *Brecon Case* (1), and the earlier authorities therein referred to. I, therefore, hold that under the second patent the locks were dedicated to the public for ever, and that a toll traverse for eighty years was granted by the Crown to Spencer. Mr. Parker suggested that no dedication could be implied for a longer term than the term of the toll traverse, and he cited *Rex* v. *Mellor*. (2) That was a case of an Act of Parliament granting terminable turnpike annuities, and it turned on the construction of the particular Act, and the Court was also influenced in coming to the conclusion that there had been no dedication in perpetuity by the consideration that the acceptance of the road would have implied the acceptance of liability to repair it. I have already pointed out that this consideration does not apply to the case of a river. I have dealt with this matter in some detail, because it was elaborately argued. But, even if I came to the conclusion that the toll created by the second patent was "toll thorough," that toll with its corresponding liability came to an end in 1718, and, unless I could adopt the plaintiffs' contention as to a lost grant (with which I will deal hereafter), the plaintiffs would gain nothing by my holding that the toll was toll thorough. I have now disposed of two of the three patents which I have already referred to, and I come to the third patent—namely, that of 1638.

[His Lordship stated the effect of the patent or charter of 1638 (14 Car. 1), and continued :—]

In my opinion, this patent is clearly void. The river had from time immemorial been navigable in sections, and had been made navigable throughout at that date from St. Ives to St. Neots, and King Charles I. had no more power to exclude

(1) L. R. 7 C. P. 555, 564.
(2) (1830) 1 B. & Ad. 32. [See per Patteson J., *Reg.* v. *Inhabitants of Lordsmere*, (1850) 15 Q. B. 689, 699.]

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the public from the river Ouse than he had to exclude them from the river Thames. It was suggested that the King was the riparian owner, and as such could make this grant. It is sufficient for me to say that this contention was not supported by evidence. Further, I find from the evidence in the suits of *Jemmatt* v. *Ashley*, to which I shall presently refer, that down to 1696 no one had ever attempted to put the patent in force, that all persons used the river on payment of the 3*d.* toll granted by the patent of 1628, and that Henry Ashley, as part owner of the rights under the patent and being a predecessor in title of the defendant, in his answer in the second suit of *Jemmatt* v. *Ashley* deposed that he had never known the patent to be put in execution, and that all traders and others had enjoyed free passage from St. Ives to St. Neots on payment of the 3*d.* toll only. It was contended on behalf of the defendant that the decree of July, 1696, in the second suit of *Jemmatt* v. *Ashley*, amounted to a decision of the validity of the patent. I do not so read the decree, and nothing short of a clear declaration would induce me to believe that the Court could have so decided. So far as the plaintiffs and the defendant Ashley were concerned, both suits were between the co-owners of whatever patent rights there were, and the validity of the patent of 1638 never came in issue. The defendant Ashley, by his answer, said that if he could support the patent he should be glad to do so. Wilkes, the other defendant in the second suit, was sued for an account as a trader using the navigation, but the only account directed against him was an account of the 3*d.* toll. The existence of this 3*d.* toll under the patent of 1628 is a little inconsistent with the supposed title to the river itself alleged to have been granted by the patent of 1638. The only item of evidence in the defendant's favour on this head is the payment of the 6*l.* 13*s.* 4*d.* rent reserved by the patent of 1638 to the Crown. The difference between this and the 5*l.* rent reserved by the patent of 1628 is small, and I infer that the larger sum was paid per incuriam down to 1718, and that the payment then continued because no one took the trouble to ascertain why or in respect of what it was paid. I do not think that this can be considered an extravagant assumption in

view of the fact that many small rents are paid by the owners of land without any inquiry as to their origin. A recent illustration of this will be found in *Adnam* v. *Earl of Sandwich*. (1) The result is that I find as a fact that the river was dedicated in perpetuity to the public in 1628 in consideration of a toll traverse created by the King contemporaneously, and that that toll expired in 1718. It has been proved that the toll of 3*d*. has been paid by all barges, &c., laden with coals, timber, and the like, without variation, down to the year 1851. In that year, in consequence of the competition of railways, the amount allowed to be carried for the 3*d*. was increased, with the result of diminishing the toll. No toll was ever paid for empty barges or for pleasure-boats before 1868. In that year, in consequence of drought, the water was very low, and the defendant's predecessor in title, at the request of the millers and for their benefit, attempted to impose a 5*s*. toll on pleasure-boats, with a view to stopping the traffic. The toll was paid in very few instances, and when paid was appropriated by the millers. Subsequently, about 1872, a 6*d*. toll on pleasure-boats was imposed by the predecessors in title of the defendant, and has been usually paid. The defendant claims, as owner, to be entitled to charge what he pleases. His title arises under a conveyance of February 3, 1893, as to which I will only say that it contains no reference to the patent of 1638, or to any exclusive right of navigation, or to the charge of 6*l*. 13*s*. 4*d*., but is really appropriate to a conveyance of the tolls as tolls. I hold that the defendant has no such title to the river or locks as would enable him to impose any charges, arbitrary or otherwise.

The plaintiffs, however, are not content with this, and they ask me to presume a lost grant in or subsequent to the year 1718 of "toll thorough" of 3*d*. per lock per ton to the plaintiffs' predecessors in title, and to infer from that a corresponding liability on the defendant to repair and maintain the locks and employ men to work them. No doubt the Courts have in many cases made strong presumptions in order to give validity to ancient titles: it is sufficient to mention *Goodman* v. *Saltash Corporation*. (2) But I am unable to make any such presumption

(1) (1877) 2 Q. B. D. 485. (2) (1882) 7 App. Cas. 633.

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in the present case. The principle is, that, when the Court finds an open and uninterrupted enjoyment of property for a long period unexplained, omnia præsumuntur rite esse acta, and the Court will, if reasonably possible, find a lawful origin for the right in question. But the gist of the principle consists in this, that the state of affairs is unexplained. Thus, in *Attorney-General* v. *Horner* (1), the Court declined to presume a lost grant of a charter to hold a market on two days in the week, because there was a void charter in existence under which the right had been claimed. Here the defendant has relied on the patent of 1638, and it is possible that his predecessors in title have considered that they had a right to take tolls under that patent. True it is that Henry Ashley did not set up that patent in *Jemmatt* v. *Ashley*, but the latest decree in those suits was in 1696, while the eighty years' term under the patent of 1628 was still running, and there is nothing to shew that after 1718 subsequent recipients of the toll did not rely, as their successor the defendant does, on the patent of 1638. Even if this were not so, the tolls may well have been received and paid after 1718, simply because both payer and payee found it to their mutual advantage to continue the old practice. The barge-owners got the advantage of the maintenance of the locks, and the recipients of the toll were content with the amounts paid. The case is somewhat similar to the case of a lessee holding over, or of partners continuing without a fresh bargain after the expiration of a partnership term. I am also influenced by the extreme improbability of any such grant having been made by any monarch of the Hanoverian line, especially as I find that in 1720, when provision was made for the St. Ives stanch (to which I shall refer presently), the course adopted was an Act of Parliament. It cannot be the duty of a judge to presume a grant of the non-existence of which he is convinced, nor can he be constrained to hold that such a grant is reasonably possible within the meaning of the authorities. The result is that the plaintiffs have succeeded in establishing that the river is a public navigable river, but they have failed to establish that the defendant is liable to maintain

(1) (1884) 14 Q. B. D. 245.

and repair the locks, and the defendant has failed in his contention that the locks are his private property.

There remains only for determination the question of the St. Ives stanch. This depends on the Act of 1720. The rights and duties of an individual or a corporation under an Act of Parliament differ materially from their rights and duties under a Royal grant. I have already pointed out the limitations in the exercise of the Royal prerogative, but there is no constitutional limit to the powers of the Legislature, and there is therefore no necessity to imply any consideration for legislative interference with public or private rights. The rights and duties under the Act are to be found within the four corners of the Act, and nowhere else. Thus a railway company, which is empowered by permissive words to make or to maintain a line and works, is under no obligation to make or maintain or reinstate the line and works, although their Acts were passed on the usual evidence of public benefit, and with the usual powers of compulsory purchase, interference with highways and the like: see *York and North Midland Ry. Co.* v. *Reg.* (1) and *Reg.* v. *Great Western Ry. Co.* (2) In the present case the Act is clearly permissive, and imposes no duties of repair or maintenance on the defendant. The Act contains a provision authorizing the appointment of commissioners, with powers to make orders and decrees for the due regulation and government of the stanch and the preservation of the river, and Mr. Upjohn invited me to make a declaration to the effect that the defendant is bound to obey such regulations. No such commissioners have ever been appointed, and I see no ground for making any such hypothetical declaration.

I propose to declare that the six locks and the stanch at St. Ives, with their appurtenances, form part of the river Ouse, and that the river Ouse from St. Neots to St. Ives is a public navigable river. As the defendant has interfered with the locks, by fastening back some of the gates and the like, I propose to grant an injunction, restraining him in general terms from interfering with the river. With regard to the costs of the action, the plaintiffs have succeeded in establishing the

(1) (1853) 1 E. & B. 178, 858. (2) (1893) 62 L. J. (Q.B.) 572.

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public right over the river, including the locks, against the contention of the defendant that the locks are his private property, but they have failed to fix the defendant with the liability to maintain, repair, and work them for the public benefit, and I therefore make no order as to costs.

[The judgment as drawn up contained a declaration that the six locks, and also the stanch, and each of them formed part of the river Ouse, and that the river in its course from above St. Neots to below St. Ives and thence to the sea, including the six locks and the stanch, was a public river and highway, and Queen's high stream, and open and free for all Her Majesty's subjects to pass and repass as of right over and along the whole thereof and all parts thereof at all times at their free will and pleasure with their boats, barges, and other vessels, whether laden or unladen, as regarded the six locks without payment of any toll, charge, or imposition whatsoever, and as regarded the stanch upon payment of such rates, tolls, and charges only as were due and payable under the statute 6 Geo. 1, c. 29, and no other rates, tolls, charges, or impositions whatsoever. And further, that the defendant was not under any liability to maintain or work any of the six locks or the stanch.

And an injunction was granted to restrain the defendant from in any way obstructing or interfering with any of Her Majesty's subjects in the exercise of their rights as above declared.]

G. M.

C. A.

The defendant appealed from the whole judgment (except the last declaration), and asked that the action might be dismissed with costs.

The plaintiffs did not give any cross-notice of appeal.

The appeal came on for hearing on March 18, 1901.

*Neville*, *K.C.*, and *R. J. Parker*, for the defendant. It is submitted that the true conclusion from the evidence is that the river between St. Neots and St. Ives has never been and is not now a public navigable river. It was navigable in sections between the mill-dams, and Domesday Book shews that at

that time the mills, and probably also the dams, were in existence. By reason of these dams it was, before the locks were constructed, impossible that the river should be a highway. It is conceded that the patent granted in 1618 to Gason was valid. But at the date of the charter of 3 Car. 1 (1628) Spencer had assigned his interest in the locks to Jackson, and that charter hiavng been granted upon the untrue assumption that Spencer had still an interest in the locks was therefore void. The grantee was not in a position to dedicate the locks to the public. Dedication in consideration of a toll traverse must be contemporaneous with the grant. At any rate, the charter ought to be construed as not granting a right to take tolls upon the Ouse. The charter could have no operation until the term of twenty-one years granted by Gason's patent had expired, and after that it was in effect superseded by the charter of 14 Car. 1 (1638). That charter negatives the notion of dedication, for it is prohibitory to the public. It is clear that the rent of 5*l.* reserved by the charter of 1628 has never been paid, though the rent of 6*l.* 13*s.* 4*d.* reserved by the charter of 1638 has always been. There is nothing to shew any dedication of the locks to the public during the period before 1638. The effect of the final decree in *Thelwall* v. *Jackson* was to leave the defendant to make what he could of the locks—in other words, he might charge what he pleased for transit through them. Until 1689 the corporation of Godmanchester were the owners in fee of the Godmanchester lock, which had during the whole of the previous period been leased to the owners of the navigation. That lock could not therefore have been then dedicated to the public.

A Royal charter ought to be construed so that it may operate in a manner consistent with its validity: Chitty, Prerogatives of the Crown, p. 394; *Case of the Churchwardens.* (1) A charter, if not good in toto, may be good in part: *Neill* v. *Duke of Devonshire.* (2) The grant here was "as much as in us lies." Some, at any rate, of the mills on the river belonged to the Crown, and the Crown has always assumed some jurisdiction over rivers. The quantity of water in the river would

(1) (1613) 10 Rep. 67 b. (2) (1882) 8 App. Cas. 135, 143.

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be diminished by the use of the locks, and this would interfere with the mills.

The charter of 14 Car. 1 can therefore be construed, and ought to be construed, as merely enabling the grantee to use the locks without objection by the Crown; it did not create any toll, but merely allowed Spencer to use the locks. The locks remained the private property of himself and his successors, and there was no dedication of them to the public. The toll taken was not a toll in the proper legal sense; it was an arbitrary charge which the owner of the locks chose to make for passage through them. In *Juxon* (or *Jackson*) v. *Thornhill* (1) the action was brought in assumpsit, and could not therefore have been for tolls. If there was a toll it was a toll traverse, and from such a toll dedication to the public cannot be implied. When a toll—whether fixed in amount or variable—has always been paid, user, however long, will not raise a presumption of dedication to the public: *Austerberry* v. *Oldham Corporation*. (2) In all the cases relating to toll traverse the action has been brought by the landowner. There cannot be a dedication to the public subject to a toll: *Austerberry* v. *Oldham Corporation* (2); *Rex* v. *Mellor*. (3) When the corporation of Godmanchester in 1689 conveyed the site of the Godmanchester lock to Ashley they reserved to themselves some powers of dealing with the lock, thus shewing that they did not regard the lock as then dedicated to the public. It is submitted that Farwell J. was right in refusing to presume a lost grant giving the owners of the locks power to levy a toll coupled with an obligation to maintain and repair the locks. Such a presumption may be made in favour of a landowner, not against him. But in the present case the origin of the payment for passing through the locks is shewn, and, that being so, the Court will not presume a lost grant: *Attorney-General* v. *Horner*. (4)

The rights of the corporation of Godmanchester in regard to the river were established by the House of Lords in *Simpson* v.

(1) Cro. Car. 132.
(2) 29 Ch. D. 750.
(3) 1 B. & Ad. 32.
(4) 14 Q. B. D. 245.

*Godmanchester Corporation* (1), and those rights are inconsistent with the existence of a public right of passage through the locks.

A right claimed in respect of a river which is not a public navigable river must be claimed in the same way as a right in respect of land: *Bourke* v. *Davis*. (2) It is doubtful whether there can strictly be a right of public navigation in a non-tidal river. In *Marshall* v. *Ulleswater Steam Navigation Co.* (3) the right was admitted.

In *Orr Ewing* v. *Colquhoun* (4) there were no locks on the river. It is consistent with the patent of 1618 that no toll strictly so called was created by it: *Newport Corporation* v. *Saunders*. (5) A "toll" in the strict sense must be certain in amount; here the amount was such as might be agreed. The patent of 1618 precluded the King from requiring an account, but it left all public and private rights untouched. At the end of the term conferred on the grantee as an inventor his only right was by virtue of his ownership of land, and, even if the later grants of 1628 and 1638 are void, that right remains. The patent of 1628 was after the Statute of Monopolies. It could not properly have applied to the Ouse, for, if it did, it would have been inconsistent with the prior grant to Gason, of which Jackson was then the assignee. It was only a confirmation to Spencer of his rights under the first charter, with the exception of the river Ouse, and a grant in reversion. The patent of 1628 has long since expired, even if it has not been surrendered.

The patent of 1638 disproves the construction which Farwell J. gave to that of 1628. In 1638 there had been no dedication to the public, and there was no public right of passage along the river, and the patent of 1638 can be construed so as not to interfere with any rights of other persons. The owner of the locks was by virtue of his ownership the only person who had a right of passage through them, and the right

(1) [1897] A. C. 696.
(2) (1889) 44 Ch. D. 110.
(3) (1871) L. R. 7 Q. B. 166.
(4) (1877) 2 App. Cas. 839.
(5) (1832) 3 B. & Ad. 411; 37 R. R. 456.

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then granted to him in perpetuity was the same right which had been granted to him previously for a term.

As regards the St. Ives stanch the Act 6 Geo. 1, c. 29, is only permissive or enabling, and cannot be treated as imposing any obligation upon the person who is authorized to construct the works and to levy the tolls. He is under no obligation to repair: *York and North Midland Ry. Co.* v. *Reg.* (1); *Reg.* v. *Great Western Ry. Co.* (2)

The defendant, it is submitted, is entitled to abandon the undertaking and to remove the stanch, if he chooses to do so.

[They also referred to *Haspurt* v. *Wills* (3) as shewing that a toll thorough cannot be claimed without proving a consideration.]

*Upjohn, K.C., Neville Tebbutt,* and *Brooke Little,* for the plaintiffs. It is submitted that the river is and always has been a public navigable river. In the Hundred Rolls it is called the "high stream" and the "high river of our Lord the King," which is the proper description of a public navigable river: Hale, De Jure Maris, Caps. II. and III. (Stuart Moore's History of the Foreshore, 3rd ed. pp. 372–4). In later documents the river is called the "high stream," which is only an abbreviation of "high stream of the King," just as "highway" is used for the "King's highway." The existence of the mill-dams is not inconsistent with the river being a highway. The waterway has always been continuous, subject to the inconvenience of crossing the mill-dams. And between the dams there was a highway from place to place. The mill-dams were encroachments upon the right of navigation, which was older than the mills, and the public user of the river, which is found to have existed in historical times, was a continuance of the ancient public user which had been encroached upon by the mills. The application by Gason for a patent or charter shews that there must have then existed a public right of user of the river, for there would have been no advantage in the construction of locks if no

(1) 1 E. & B. 178, 858. (2) 62 L. J. (Q.B.) 572.
(3) (1670) 1 Mod. 47; 1 Vent. 71.

one could use the river without the permission of the adjoining landowners. No profits would have been derived from boats passing through the locks. The decrees in *Thelwall* v. *Jackson* shew that those persons who had constructed the locks had dedicated them to the public, for it is clear that a public right of passage through them then existed, and the Court assumed jurisdiction to decide what was a reasonable toll. Throughout the proceedings in *Thelwall* v. *Jackson*, which lasted from 1628 to 1633, there is nothing to shew that Jackson ever denied that the public had a right of passage through the locks, or alleged that the amount of the toll was arbitrary. The true conclusion from the documents is that, though Jackson was the owner of the locks soon after the date of the charter of 3 Car. 1, he was not the owner at that date. In fact, that charter passed the Privy Seal still earlier, namely, in June, 1628. By that charter the toll of 3*d.* was established, and it has ever since continued to be paid. If the meaning of the language of the charter is doubtful it is explained by contemporaneous and subsequent usage. It was beyond the power of the Crown to grant (as the charter of 1638 professed to grant) to any subject "the sole and exclusive passage and transit for boats laden with goods" upon a public navigable river, and therefore that charter was void. And, even if the river was not public at that date, still the Crown had no power to grant such a monopoly over the lands of private riparian owners. And, if the charter is to be taken in the restricted sense suggested by the defendant, it does not affect the plaintiffs' case. The result is that after 1638 the charter of 3 Car. 1 alone existed, and Farwell J. was right in holding that the tolls ceased at the expiration of the term of eighty years granted by that charter. As regards the Godmanchester lock, the evidence shews that before 1689 the corporation had granted several consecutive leases of it, and during that period there was a public user of that lock, and there is a presumption that it was dedicated to the public: *Winterbottom* v. *Lord Derby* (1); *Rex* v. *Barr* (2); *Davies* v.

(1) (1867) L. R. 2 Ex. 316. (2) (1814) 4 Camp. 16; 15 R. R. 721.

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*Stephens* (1); *Attorney-General* v. *Biphosphated Guano Co.* (2); Wellbeloved on Highways, ed. 1829, p. 60. In Hale, De Jure Maris, Cap. III. (Stuart Moore's History of the Foreshore, 3rd ed. p. 375), it is said: "if he purchaseth the King's charter to take a reasonable toll for the passage of the King's subjects, and puts it in use, these seem to be devoting and as it were consecrating of it" (the stream) "to the common use." This applies exactly to the obtaining by Spencer of the charter of 3 Car. 1. The public have, in fact, for more than 200 years passed through the locks on payment of a fixed toll, and the Court will make every possible presumption in favour of a practice so long continued. If necessary, the Court will presume the grant of a charter to Ashley giving him the right to demand a toll, coupled with the duty to maintain the locks. The grant passes a reasonable toll, if the amount is not specified: *Stamford Corporation* v. *Pawlett.* (3) If the term granted by the charter of 3 Car. 1 expired in 1718, the Court will, in order to account for the subsequent usage, presume the grant of a subsequent charter. It is argued, on the authority of *Attorney-General* v. *Horner* (4), that such a presumption cannot be made, because here the origin of the toll is known. But that was a special case, and it does not apply to the present case, in which there is no charter now existing which accounts for the usage of the last 200 years. The right of the corporation of Godmanchester is exercisable only during times of flood when the river is not navigable, and their right is to have the locks opened, not shut. This right cannot interfere with the public right of passage through the locks. The King had power to authorize a subject to improve the river and to grant him a toll thorough, the consideration being the improvement of the river. The added locks became a part of the river and were dedicated to the public, subject to the payment of a toll during a term which has now expired.

As regards the St. Ives stanch, the defendant has no ground

(1) (1836) 7 C. & P. 570; 48 R. R. 820.
(2) (1879) 11 Ch. D. 327.
(3) (1830) 1 C. & J. 57; 35 R. R. 675.
(4) 14 Q. B. D. 245.

of complaint against the judgment. By the Act of 1720 the right to take tolls is expressly given to Ashley in consideration of the expense which he would incur in making, maintaining, and repairing the stanch. The defendant as his successor is bound to do this, and the judgment ought to have declared that he is liable to do it. So long as he receives the tolls the defendant is bound to maintain and repair the locks and the stanch: *Nicholl* v. *Allen*. (1)

[On the question of dedication to the public the following cases were also referred to: *Arnold* v. *Blaker* (2); *Elwood* v. *Bullock* (3); *Grand Surrey Canal Co.* v. *Hall* (4); *Bradley* v. *Pilots of Newcastle*. (5) And as to the presumption of a lost grant the following case was cited: *Penryn Corporation* v. *Best*. (6)]

[In the course of the argument VAUGHAN WILLIAMS L.J. referred to *Nuttall* v. *Bracewell* (7) and *Newton* v. *Cubitt*. (8)]

*Neville, K.C.*, in reply. The Court will not presume the grant of a charter by the Crown at such a recent time as is suggested by the plaintiffs. From the time of Queen Elizabeth the records of the charters are perfect: *London Corporation* v. *Chilton*. (9) [He also referred, upon the point that in a claim to a toll for passing over a highway the reservation of the toll must be contemporaneous with the dedication of the land to the public, to *Lord Pelham* v. *Pickersgill* (10); and as to whether permissive words in an Act of Parliament should be construed as being in fact obligatory, to *Darlaston Local Board* v. *London and North Western Ry. Co.* (11) and *Reg.* v. *Lancashire and Yorkshire Ry. Co.* (12)]

*Cur. adv. vult.*

Aug. 9. RIGBY L.J. I am of opinion that, notwithstanding all which has taken place, a judgment ought to be given in this action, the particulars of which I will indicate. I have read

(1) (1862) 1 B. & S. 916.
(2) (1871) L. R. 6 Q. B. 433.
(3) (1844) 6 Q. B. 383.
(4) (1840) 1 Man. & G. 392.
(5) (1853) 2 E. & B. 427.
(6) (1878) 3 Ex. D. 292.
(7) (1866) L. R. 2 Ex. 1.
(8) (1862) 12 C. B. (N.S.) 32.
(9) (1878) 7 Ch. D. 735, 741.
(10) 1 T. R. 660; 1 R. R. 348.
(11) [1894] 2 Q. B. 694.
(12) (1852) 1 E. & B. 228, 246.

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the judgments proposed to be given by Vaughan Williams and Stirling L.JJ., and I do not think it necessary to repeat at length what is contained in those judgments. In substance they treat the provisions of the charter of 14 Car. 1 as being still operative, and those of the charter of 3 Car. 1 as being no longer in force, which is equally the case whether the latter charter was merged or has expired by effluxion of time, surrender, or otherwise. I do not consider it necessary to inquire how far that charter of 3 Car. 1 operated. The charter of 14 Car. 1, and what was done under it, and the Act of 1720 appear to me fully sufficient for the dedication of the whole bed of the river, within necessary boundaries, for the purposes of navigation. I agree, so far as is necessary, with the interpretation placed by my learned brethren upon what was done by the predecessors of the defendant Simpson, and I consider that, as their successor, he became bound thereby, retaining all the time, under the charter of 14 Car. 1, a power (among other things) of increasing in a proper degree the tolls payable to him, but remaining liable for the time being to all the terms of the charter so far as it is binding upon him. I do not think that the relators and plaintiffs are entitled to insist as against him that the tolls heretofore payable are fixed in amount, but, in my opinion, they are liable to variation, within reasonable limits. There should, I think, be no costs of the appeal.

VAUGHAN WILLIAMS L.J. read the following judgment:—I agree with Farwell J. in his main conclusion that the river Ouse in the part in question in this action is a navigable river and a public highway, but I do not agree that the charter of 14 Car. 1 (1638) is for any reason void. I further think that the charter or letters patent of 3 Car. 1 (1628) is not in force now, and I doubt whether it ever was a valid and effective grant. The rent reserved by it does not appear by the Exchequer Records to have been ever paid, and the charter of 14 Car. 1 seems to have been granted instead of it. The two reasons which Farwell J. gives for holding the charter of 14 Car. 1 void are—(1.) that the Ouse was at the date of the charter a navigable river in sections; (2.) that the earlier

charter of 3 Car. 1 constituted a dedication by Spencer of the river as a public highway. I am of opinion that both these reasons fail. The first fails, because the deed of 1467 and all the other documentary evidence shew that the sectional right of navigation was not a public right for all the King's subjects, but a private right belonging to a section of the public. The second reason fails, because Spencer had no right to dedicate the river as a public highway. His right at the highest was to dedicate the sluices, and, even supposing that the difficulty is got over that the sluices in 1628 were vested in Jackson, and not in Spencer, yet neither Spencer nor Jackson could dedicate more than the sluices. I think that probably the river Ouse had by 1638 become a navigable river up to St. Neots, and nearly to Bedford, but that this had come about by the public availing themselves largely of the increased facilities of through navigation afforded by the sluices constructed under Gason's patent, and the acquiescence in this user by the riparian owners, lords of manors, and others who had the power of preventing it, and that this is sufficient evidence of dedication of the river as a common highway by such owners and lords and those concerned, and of the sluices by Spencer and Jackson, and that this state of things, which had been gradually evolving from the increased facility of navigation, and the acquiescence of those who had the power to dedicate, was clenched by the Crown by the charter of 14 Car. 1, whereby the Crown accepted the dedication. I think that the charter of 14 Car. 1 is a good charter, and that it is based on the assumption that by 1638 the acquiescence in the user of the river by the public was evidence of the dedication of the river as a navigable river and public highway, or, at all events, on the assumption that the grantee would suffer all the King's subjects to have in perpetuity the benefit of that franchise of navigation which had been granted to him and his heirs in perpetuity. It may be that the grant was in the nature of a grant of ferry, or that it was in the nature of a "toll thorough" on a public river, or a "toll traverse" in respect of the public right of passage through the sluices. But, be it which it may, Simpson and his predecessors, who have paid the rent of 6*l.* 13*s.* 4*d.* reserved

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by the charter of 14 Car. 1, and who have asserted and enjoyed the privileges granted by that charter, including the collection of tolls, cannot be heard to say that there is no public right to use the river on the payment of the proper toll. The charter of 14 Car. 1 begins with a recital that Arnold Spencer, "by virtue of certain letters patent of 3 Car. 1, has made navigable and passable our river of Ouse, between St. Ives, in the county of Huntingdon, and St. Neots, and thence to within four miles of Bedford, in the county of Bedford, to the ease and benefit not only of the inhabitants of the said counties, but also of other counties adjoining the said river"; and then the charter proceeds: "We, therefore, wishing that the said Arnold Spencer may receive adequate and ready compensation and reasonable satisfaction for his great costs and expenses in carrying out these works, . . . . have given and granted, and by these presents, for us, our heirs and successors, give and grant to the said Arnold Spencer, his heirs and assigns (as much as in us lieth), the sole and exclusive passage and transit for boats, barges, and other vessels laden with corn, coal, and all other goods and merchandise, through all that river or trench of Ouse leading from St. Ives to St. Neots, and thence to within four miles of Bedford, and so much further as the said Arnold Spencer, his heirs or assigns, shall hereafter make, or cause to be made, the said river navigable; . . . . to have and to hold the said several passages and transits through the said river Ouse, . . . . and all and singular other the premises by these presents granted, and all manner of profits, commodities, advantages, and emoluments whatsoever by reason or on account of the carrying or recarrying of all and any goods of whatever kind in any ships, barges, boats, or other vessels, . . . . yielding throughout annually to us, our heirs and successors, for the said passage in and upon the said river Ouse from St. Ives aforesaid 6*l.* 13*s.* 4*d.*" Now, having regard to these passages, it seems to me impossible for the heirs or assigns of Arnold Spencer to deny that what was granted by this charter was granted so far as relates to the carriage mentioned in the charter for the benefit of the public generally, and I have no doubt but that the user of the river Ouse between St.

Ives and Bedford since the granting of this charter and under it has made the river Ouse in that part a navigable river and common highway and the "Queen's high stream," open and free for all Her late Majesty's subjects as against both the successors of Arnold Spencer and all the riparian proprietors, subject, nevertheless, to the right of Arnold Spencer and his successors to charge a reasonable toll for the use of the works erected by Arnold Spencer and his successors for the purpose of making the river navigable above St. Ives. I do not find anything in the charter fixing or limiting the charge to be made by Arnold Spencer and his successors. It must be a reasonable charge, and I see no reason why the charge should not vary with the value of money, and I think that it ought to be based on and include a profit, beyond the necessary cost of repair and maintenance. But I do not think we are called on in this action to determine the measure of a reasonable toll.

Before leaving this part of the case relating to the six locks and sluices, other than the St. Ives stanch, I wish to say that I fully recognise the difficulties arising in respect of the charter of 14 Car. 1, by reason of its being couched in terms which are inconsistent with the rights of the public in a navigable river. But I think that in the construction of a charter reserving to the Crown a rent, which has been paid for such a length of time as this has been, one ought to adopt a construction consistent with the grant falling within the powers of the Crown, rather than a construction which would make the grant in excess of the Royal prerogative, and in the same way I think that one ought to presume, unless there is clear evidence to the contrary, that the state of things at the date of the charter was such as to make the grant of it within the powers of the Crown. Take, for instance, the question whether one is to treat the patent of 3 Car. 1 as constituting a dedication of the river Ouse as a public highway, or the question how one is to regard the sectional right of passage on the Ouse prior to the building of the sluices. I should say that wherever there is a doubt one ought to draw inferences consistent with the validity of the patent, rather than those

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which would be inconsistent. And throughout this case it is to be borne in mind that the patent of James I. was in the nature of a grant of a monopoly, and that the patent of 3 Car. 1 (granted, it is to be noted, after the passing of the Statute of Monopolies for a term inconsistent with that statute) was in its nature a temporary grant, which should not easily be taken to affect or limit the prerogative of the Crown to make a subsequent grant in perpetuity, not for the benefit of an inventor, but for the benefit and advantage of the public.

It remains to deal with the question of the St. Ives stanch. I cannot agree with the view that the right to take the toll exists independently of the obligation to repair or maintain the stanch in such a condition as to keep the river navigable. It is quite true that the principle established by *York and North Midland Ry. Co.* v. *Reg.* (1), that permissive powers contained in an Act of Parliament are not to be construed as compulsory, unless there is something in the context or subject-matter justifying such a construction, applies as well to the maintenance of the authorized works as to their construction, as was decided in *Reg.* v. *Great Western Ry. Co.* (2) But it does not follow that the grantee of a toll created by Act of Parliament can levy the toll irrespective of doing and executing the work in regard to which the toll purports by the Act to be granted. [His Lordship quoted the second recital in the Act 6 Geo. 1, c. 29, and the grant of tolls which followed it, and continued:—]

I think that, if the grantee of the toll fails to maintain and repair the stanch and other works so as to keep the river navigable, he cannot collect the toll.

The result, in my judgment, is that the order of Farwell J. must be amended, first, as to the river above St. Ives, by declaring that the defendant Simpson is entitled to a reasonable toll under the charter of 14 Car. 1. But I do not think that toll extends to pleasure-boats; it extends only to boats carrying commodities. Secondly, as to the St. Ives stanch, I think the defendant Simpson is only entitled to the tolls so

(1) 1 E. & B. 858. (2) 62 L. J. (Q.B.) 572.

long as he keeps the stanch in such repair as to render the river navigable.

I think that under Order LVIII., r. 4, we can make the proper declaration, notwithstanding that there is no appeal by the plaintiffs against so much of the judgment as declares that the defendant is not bound to repair and maintain the works.

STIRLING L.J. read a judgment, in which, after stating the nature of the plaintiffs' claim and the effect of the judgment at the trial, he continued:—The plaintiffs thus succeeded in establishing rights differing from those claimed by the writ, the learned judge holding in substance that the plaintiffs were entitled to the free use of the locks and stanch, without any payment, except such as might be payable under the statute 6 Geo. 1, c. 29, but that the plaintiffs were not entitled to insist on the locks and stanch being maintained and worked by the defendant.

The case as to the six locks above St. Ives stands somewhat differently from that as to the stanch below that town, and I proceed in the first place to deal with the former alone.

[His Lordship then stated (as above) the conclusion of Farwell J. (which he accepted) as to the navigability of the river Ouse in 1618. He stated the effect of the patent of 1618, and continued:—]

This patent appears to be an inventor's patent, and to be applicable to all rivers, waters, and streams within the realm, whether public or private. I do not think that it grants to the patentee anything in the nature of a toll, though it does prevent the owners of vessels from making use of the invention without the licence of the patentee.

[His Lordship then stated the assignment of the patent to Spencer and Girton and the subsequent assignment to Jackson; the erection of the six locks; the proceedings before the Privy Council; the institution of the Chancery suit *Thelwall* v. *Jackson* and the result of it, and continued:—]

Jackson's legal rights were two-fold. First, those which he possessed as owner of the patent of 1618, and, secondly, those which he enjoyed as legal owner of the land on which the

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sluices or locks were erected. These last seem to me to be recognised in the case of *Juxon* (properly *Jackson*) v. *Thornhill* (1), (which related to the use of the very locks in question), and to have formed part of the basis of the judgment. I may observe that the argument in that case was founded on the fact that the Ouse was a public river, but the locks or sluices were held not to be subject to public right, and, down to the conclusion of the Chancery proceedings in February, 163$\frac{2}{3}$, I see no trace of any dedication of those locks or sluices to the public.

[His Lordship then stated the effect of the charter of 1628, and continued:—]

There are many difficulties which arise in connection with this instrument. The exact date at which Jackson became assignee of Spencer does not appear, but the proceedings in the Privy Council already referred to (see orders of June 20, 1627, October 20, 1628, February 11, 1628) appear to shew that on June 20, 1627, Jackson was owner of Gason's patent, and of the sluices erected on the Ouse by virtue of it, and that he continued to be owner of these properties in 1628. Consequently, at the date of the charter of 3 Car. 1, Spencer was not the owner of the invention for which Gason's patent was granted. At this time the Statute of Monopolies (21 Jac. 1, c. 3) had been passed, and, although that statute preserved the rights of patentees who had previously obtained grants for periods not exceeding twenty-one years, it prevented the granting of any fresh patent, except for a new invention. If the charter of 3 Car. 1 was intended to confer any fresh right on Spencer, it was bad under that statute; if, on the other hand, it was intended to be confirmatory of Gason's patent, it would seem that it ought to have been granted to Jackson.

We are, however, more immediately concerned with the second part of the charter, which has been held by Farwell J. to create in favour of Spencer a franchise in the nature of a toll traverse, and to import a contemporaneous dedication by him of the locks to the public. With these legal conclusions

(1) Cro. Car. 132.

I shall deal at a later stage, but I may remark in passing that, if, as the evidence appears to establish, Jackson was the owner of the locks at the date of this charter, it is difficult to see how any effectual dedication in favour of the public could then be made by Spencer.

Jackson is stated to have remained the owner of the patent and the locks for a period of about seven years. The precise date at which his ownership terminated does not appear, but it is conceded that it came to an end before 1638, and that upon the happening of this event Spencer again became the owner. Spencer then procured the King to grant him a further charter which bears date December 11, 14 Car. 1 (1638).

[His Lordship stated the effect of that charter, and continued :—]

Farwell J. has held that the charter of 14 Car. 1 is bad, on the ground that it was beyond the power of the King to grant it, the river having been from time immemorial navigable in sections, and having become (by reason of the dedication of the sluices to the public) navigable from St. Ives to St. Neots before 1638.

Upon this view of the effect of the charters of 3 Car. 1 and 14 Car. 1 taken by the learned judge, all right on the part of those claiming under Spencer to take any toll ceased on the expiration of the term of eighty years, for which the toll was granted by the charter of 3 Car. 1—that is, in 1718. Yet there is evidence that down to shortly before the commencement of the present action tolls were regularly levied on all boats passing through the locks and carrying merchandise, at the rate of 3*d.* per ton per lock. It is also remarkable that, after the recital contained in the charter of 14 Car. 1, no mention of the charter of 3 Car. 1 is found in any document. In particular it is to be observed that in the two suits of *Jemmatt* v. *Ashley, Sen.* and *Jemmatt* v. *Ashley, Jun.*, which raised questions between persons claiming through or under Spencer, the title to the tolls claimed by the plaintiffs in respect of the sluices is rested on the charter of 14 Car. 1, and not on that of 3 Car. 1.

[His Lordship stated the nature of the suit *Jemmatt* v.

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*Ashley, Jun.*, and the decree therein, as above mentioned, and continued:—]

It seems to me that in this suit *Jemmatt* v. *Ashley, Jun.*, the plaintiffs put in force as against the defendant Wilkes the rights conferred by the charter of 14 Car. 1. On the other hand, I find no evidence that the rights purported to be conferred by the charter of 3 Car. 1 were ever put in force against any one.

Looking at all these facts, I think the true inference is, that the charter of 3 Car. 1 was never put in use, but was surrendered to the Crown on the grant of that of 14 Car. 1. Probably the acceptance of the latter charter ought to be held to effect a surrender of the former by operation of law, but, if necessary, I can see no difficulty in presuming a lost surrender.

The law as to dedication to the public in such a case is stated by Sir M. Hale at the close of Cap. III. of his treatise De Jure Maris as follows (Stuart Moore's History of the Foreshore, p. 375): "If any person at his own charge makes his own private stream to be passable for boats or barges, either by making of locks or cutts, or drawing together other streams; and hereby that river, which was his own in point of propriety become now capable of carriage of vessels; yet this seems not to make it juris publici, and he may pull it down again, or apply it to his own private use. For it is not hereby made to be juris publici, unless it were done at a common charge, or by a publick authority, or that by long continuance of time it hath been freely devoted to a publick use. And so it seems also to be, if he that makes such a new river or passage doth it by way of recompense or compensation for some other publick stream that he hath stopped for his own conveniency; as in the case of the Abbot of St. Austin's, Canterbury, mentioned in the register. So likewise if he purchaseth the King's charter to take a reasonable toll for the passage of the King's subjects, and puts it in use, these seem to be devoting and as it were consecrating of it to the common use. As he, that by an ad quod damnum, and licence thereupon obtained, changeth a way, and sets out another in his

own land; this new way is thereupon become juris publici, as well as a way by prescription. For no man can take a settled or constant toll even in his own private land for a common passage without the King's licence."

According to the law there laid down it is essential to a dedication to the public that a private owner should not merely purchase "the King's charter to take a reasonable toll for the passage of the King's subjects," but should *put the charter in use*.

If, therefore (as I find), the charter of 3 Car. 1 was never put in use, there was no dedication to the public under it, and the ground on which Farwell J. held the charter of 14 Car. 1 to be invalid fails.

To this latter charter the defendant attributes a very narrow operation. At the date of it some, if not all, of the mills on the Ouse belonged to the Crown, and the defendant contends that it was merely intended to take effect as between Spencer, on the one hand, and the Crown and the tenants and servants of and other persons claiming under the Crown, on the other. The peculiar position taken by the plaintiffs on this appeal has prevented them from arguing in support of a different construction of the charter.

I feel bound, however, to say that, in my judgment, the charter is expressed in language appropriate to create a franchise, and that, if the true effect of it be that a valid franchise has been created, it affords a legal origin for the tolls which are proved to have been taken by the plaintiffs and their predecessors in title, as already mentioned. It is, therefore, to be considered whether the Crown could by charter confer on a subject such a franchise.

I have been unable to find any case in which a similar charter has been the subject of decision by the Courts. The right to a ferry has, however, been frequently considered; its general nature is thus explained by Sir M. Hale at the beginning of Cap. II. of his treatise De Jure Maris (Stuart Moore's History of the Foreshore, p. 372):—

"The King by an ancient right of prerogative hath had a certain interest in many fresh rivers, even where the sea doth

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not flow or reflow, as well as in salt or arms of the sea; and those are these which follow:—

"First, a right of franchise or privilege, that no man may set up a common ferry for all passengers, without a prescription time out of mind, or a charter from the King. He may make a ferry for his own use or the use of his family, but not for the common use of all the King's subjects passing that way; because it doth in consequence tend to a common charge, and is become a thing of publick interest and use, and every man for his passage pays a toll, which is a common charge, and every ferry ought to be under a publick regulation; viz. that it give attendance at due times, keep a boat in due order, and take but reasonable toll; for if he fail in these, he is fineable."

It is laid down in *Peter* v. *Kendal* (1) that it is not necessary that the owner of a ferry should have the property in the soil on either side of the stream. He must have a right to use the land on both sides of the water for the purpose of embarking and disembarking his passengers, but he need not have any property in the soil on either side. It is sufficient if the landing place be a public highway.

Now, this charter recites that Spencer had made the river Ouse "navigable and passable" within certain limits. This is true in the sense that Spencer, by making locks and sluices, had made it navigable throughout those limits, whereas it had been before navigable only in sections—that is, from mill-dam to mill-dam. Spencer had erected at the side of each mill-dam, on land belonging to himself, a lock or sluice; he had a right, as a member of the public, to pass from mill-dam to mill-dam; he could by virtue of his own legal title to the locks and sluices continue his passage beyond the mill-dams. The franchise conferred appears to me, on the true construction of the charter, to be the exclusive right of conveying goods in boats by means of the navigation which Spencer had created—that is, the through navigation rendered possible by the new locks or sluices. This right closely resembles that of a ferry, and I can see no reason why it should not be in the power of

(1) (1827) 6 B. & C. 703, 710-11; 30 R. R. 504.

the Crown to create it. The exercise of the right would impose on the grantee obligations similar to those of a ferryman, as, for example, to attend at the locks at due times, to keep them in proper working order, and to take reasonable tolls.

In *Allnutt* v. *Inglis* (1) Lord Ellenborough C.J. said (2): "There is no doubt that the general principle is favoured both in law and justice, that every man may fix what price he pleases upon his own property or the use of it: but if, for a particular purpose, the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must as an equivalent perform the duty attached to it on reasonable terms."

In my judgment the defendant's predecessor in title, by applying for and putting in use the charter of 14 Car. 1, gave the public a right to resort to the locks and sluices, which were his property, for the purpose of passing from section to section of the river Ouse, and, inasmuch as the same charter conferred on that predecessor a monopoly for that purpose, he and his successors came under an obligation to perform the duties attached to that monopoly.

The defendant has been since the year 1893 and still is the owner in equity (subject to a legal mortgage) of the six locks in question, and of the rights conferred by the charter of 14 Car. 1, but he holds them subject to the rights of the public, and to the performance of the duties imposed by the acts of his predecessors in title, and, according to the law as laid down in the passage from Hale, De Jure Maris, Cap. III. (already quoted), he cannot (any more than his predecessors) apply the site of the locks to his own private use. He is, however, in my opinion, entitled to receive proper and reasonable tolls. Those tolls, as was decided in *Lawrence* v. *Hitch* (3), may vary in amount with the value of money, and I agree with Vaughan Williams L.J. in thinking that upon the terms of the charter of 14 Car. 1 the tolls ought to be of such an amount as to provide a reasonable profit to the defendant. I also think that

(1) (1810) 12 East, 527; 11 R. R. 482. (2) 12 East, 538.
(3) (1868) L. R. 3 Q. B. 521.

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the defendant, being entitled to such tolls, is subject to the obligation of maintaining and working the locks: see *Allnutt* v. *Inglis* (1); *Bolt* v. *Stennett*. (2)

I agree as to the stanch below St. Ives with what has been said by Vaughan Williams L.J.

I think that this Court ought to exercise the power conferred by Order LVIII., r. 4, namely, "to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require." The order confers power to do this, although the appeal may be from part of the judgment only, and although the respondent may not complain of the decision.

The following alterations ought, therefore, to be made in the judgment:—

In the second declaration, for the words "without payment of any toll, charge, or imposition whatsoever," there ought to be inserted "upon payment, in the case of boats, barges, or other vessels laden with food, coal, goods, or merchandise, of such tolls, rates, and charges as may from time to time be reasonable."

For the third declaration there ought to be substituted the following: "that the defendant is bound to maintain the said locks above St. Ives in an efficient state and condition, and to provide all such attendants and appliances as may be necessary to enable the subjects of His Majesty to have free and convenient passage through the same, and, taking the tolls, to maintain and repair the said stanch, lock, and other works below St. Ives, subject only, as to the said locks, stanch, and works in case of boats, barges, and other vessels laden with food, coal, goods, or merchandise, to such tolls, rates, and charges as are hereinbefore respectively mentioned."

It is further complained that the injunction granted in the terms already stated has been so framed as to prevent the defendant from discharging a duty imposed on him by statute to obey a direction given by the corporation of Godmanchester to take up and remove the stanch and works in time of flood, so that the waters of the river may have a more free and easy

(1) 12 East, 527; 11 R. R. 482. (2) (1800) 8 T. R. 606; 5 R. R. 486.

passage. If desired, the order now to be made may provide that the injunction shall not have this operation.

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Solicitors: *Batten, Proffitt & Scott; Peacock & Goddard, for J. Percy Maule, Huntingdon.*

W. L. C.

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## HAND *v.* BLOW.

C. A. 1900 STIRLING J. *June* 13, 14. C. A. 1901 *June* 27.

[1899 H. 2713.]

*Mortgagor and Mortgagee—Leaseholds—Mortgage by Sub-demise—Company—Action by Mortgagee or Debenture-holder—Debenture Trust Deed—Trustee Mortgagees — Receiver, Use or Occupation by—Head-lease—Rent—Breach of Covenant—Damages — Landlord—Head-lessor, Rights of—Privity of Estate—Sale of Goods by Receiver—Distress, Loss of Remedy by.*

Since a mortgagee of leaseholds by sub-demise in the usual form is, through absence of privity of estate, not himself liable to the head-lessor for rent or other outgoings, whether he is in possession or not, it follows that a receiver appointed by the Court in an action by the mortgagee against the mortgagor to enforce the security is also under no such liability, his appointment being in right of the mortgagee. Hence the head-lessor cannot require the receiver to pay, out of moneys coming to his hands while in the use or occupation of the mortgaged premises as receiver, any rent or other outgoings in respect of such use or occupation. And there is no equity entitling the head-lessor to claim payment from the receiver by reason of the latter having been put into use or occupation as an officer of the Court, even though he has, by the direction of the Court, sold off the mortgagor's goods on the premises and so deprived the head-lessor of his landlord's remedy by distress.

Thus, in a debenture-holder's action against the trustees of the trust deed who were mortgagees from the company by sub-demise of premises of which the company were lessees, the Court of Appeal, affirming Stirling J., disallowed a claim by the head-lessor against the receiver appointed by the Court to payment, out of the proceeds of the company's goods sold by the receiver while in occupation of the premises, of rent in respect of the occupation and of damages for a breach of the company's covenant in the head-lease to repair.

By a lease dated April 27, 1899, four shops in the Edgware Road, London, were respectively demised by Charles Hodgkinson to a drapery company called "Owen Jones, Limited," for certain terms of years at a total yearly rent of 930*l.* payable in advance on the usual quarter days, the lessees covenanting to

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keep the premises in repair, and the lessor reserving a right of re-entry for breach of covenant or in case of the company going into liquidation.

The company went into possession of the demised premises and proceeded to carry on business there.

On July 29, 1898, the company being about to issue mortgage debentures, a trust deed was executed, whereby the company, as beneficial owner, demised the above leasehold premises to trustees, for the several terms mentioned in the head-lease, except the last three days thereof respectively, by way of security for the payment of the debenture debt and interest, the company holding the last three days of the said terms respectively upon trust for the trustees. And the company thereby charged in favour of the trustees its other assets both present and future, including uncalled capital, with the payment of all moneys for the time being owing on the security of the present deed, such charge to be a floating security; the security to become enforceable in the event (among others) of the passing of a valid resolution to wind up, or of the company committing a breach of any covenant or condition in the present deed or in the mortgage debentures. And the trustees were empowered, as soon as the security became enforceable, to appoint a receiver and manager in the same manner as if they were mortgagees within the meaning of the Conveyancing and Law of Property Act, 1881, and had become entitled under that Act to exercise a power of sale.

The company having got into difficulties passed a resolution, in August, 1899, for a voluntary winding-up, whereupon the trustees of the debenture trust deed, acting under their power, on August 16, 1899, appointed Alfred Page receiver and manager of all the company's assets.

The plaintiff in the present action had advanced considerable sums of money to the company, and claimed to have a security for the same under various documents which purported to create a charge in his favour upon the company's assets or some parts thereof. On August 17, 1899, he commenced this action against the trustees, certain alleged incumbrancers, and the company, to enforce his security, and by an order made in

the action on August 29, 1899, on the plaintiff's application, Page was appointed receiver and manager.

As receiver and manager, first under his appointment by the trustees and afterwards under his appointment by the Court, Page entered into possession of the demised premises, and carried on the company's business there.

On February 21, 1900, Hodgkinson, the head-lessor, served his lessees, the company, with a notice to make good certain dilapidations on the premises pursuant to their covenant to repair, but the notice was never complied with.

On March 20, 1900, the receiver and manager, under an order of the Court, sold all the company's stock-in-trade and effects that were upon the premises, and by March 24 he had cleared off the whole of the goods.

The quarter's rent for the premises due in advance at Christmas, 1899, had been paid by the receiver and manager, but default was made in payment of the quarter's rent due in advance on March 25, 1900; whereupon Hodgkinson, the head-lessor, on March 29, 1900, took out a summons in the action for leave to distrain for that quarter's rent, which summons, in consequence of the company's effects having been sold off, was amended by asking further for an order that any deficiency in the amount to be realized by the distress might be paid to him by the receiver and manager out of the proceeds of sale, or out of any other moneys in his hands as such receiver and manager, or otherwise paid by the receiver and manager out of his own proper moneys: also that, in default of sufficient distress being found or of non-payment of the said rent, the applicant might be at liberty to re-enter and determine the head-lease; and that in the latter alternative it might be ordered that out of the moneys then in, or which might come to, the hands of the receiver and manager there might be paid to the applicant (1.) a sum for rent for the use and occupation of the premises by the receiver and manager from March 25, 1900, up to the date of such re-entry and determination; (2.) the value of the dilapidations which had or should have accrued to the premises under the covenants in the head-lease from the date of the first appointment of the receiver and manager by

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the trustees up to the date of such re-entry and determination; and (3.) the applicant's solicitor's and surveyor's costs of and incident to the notice of dilapidations, the inspection of the premises, and the present application. Upon the application coming before the master on May 7, 1900, he made an order giving the receiver and manager leave to deliver up possession to the applicant forthwith, but so much of the application as related to the payment of rent and dilapidations he adjourned into Court.

The receiver and manager remained in possession until May 9, 1900, the half-quarter day, when he gave up possession to Hodgkinson.

The rest of the application was heard before Stirling J. in Court on June 13 and 14, 1900.

*Upjohn, Q.C.*, and *P. F. Wheeler*, for the plaintiffs. The rent due on March 25 ought to be paid to the receiver. It is true he was not carrying on the business, but he was in possession and endeavouring to let or sell the property. The case is covered by the decision in *In re Oak Pits Colliery Co.* (1) There was a winding-up in that case, but the principle is the same.

[STIRLING J. It is a debt of the company which you are asking me to order the receiver to pay.]

Yes, on the principle that he who gets the benefit ought to bear the burden. It is an expense properly incurred by the receiver: *In re Lundy Granite Co.* (2); *Neate* v. *Pink* (3); *Balfe* v. *Blake* (4); *Ex parte James* (5); *Ex parte Simmonds.* (6)

*Martelli*, for the receiver and manager and for the trustees. The cases cited are distinguishable, because in every one of them the estate which was being administered was the estate of the person liable to pay the rent. That is not the case here. Here the estate is being administered adversely to the landlord. The receiver is not the representative of the tenant, but of the

(1) (1882) 21 Ch. D. 322.
(2) (1871) L. R. 6 Ch. 462, 466.
(3) (1846) 15 Sim. 450; (1851) 3 Mac. & G. 476.
(4) (1850) 1 Ir. Ch. Rep. 365.
(5) (1874) L. R. 9 Ch. 609.
(6) (1885) 16 Q. B. D. 308.

tenant's mortgagees, who are sub-lessees, and are under no liability to pay the head-rent. This is an attempt to get B.'s debt out of A.'s estate. The Court will not take away the mortgagee's security to pay the mortgagor's debt: *Ramage* v. *Womack*. (1)

[STIRLING J. referred to *Cox* v. *Bishop* (2) and *Brocklebank* v. *East London Ry. Co.* (3)]

*Upjohn, Q.C.*, in reply, referred to *Great Eastern Ry. Co.* v. *East London Ry. Co.* (4) and *Jacobs* v. *Van Boolen*. (5)

STIRLING J. This summons raises a question which, so far as I know, has never been agitated before. [His Lordship stated the facts, and continued:—] The question before me is whether or not it is right and proper that the receiver should be ordered to pay the rent for the period from March 25, 1900, down to May 7, when the lease was put an end to, and should also be ordered to pay dilapidations, which I understand to mean damages for certain breaches of covenant, e.g., the covenant for repairs. Both claims, as it seems to me, stand on the same footing. Now it is quite clear, and it is admitted on behalf of the applicant, that if the trustees had been in possession themselves, as the receiver was in fact, there would have been no liability on their part either at law or in equity to make either of these payments. At law there is neither privity of estate nor privity of contract between the landlord and these trustees. The case in equity is equally strong, and the decisions are referred to in the recent case of *Ramage* v. *Womack* (1), the leading case being that of *Cox* v. *Bishop*. (2) That being so as regards the trustees, why is the receiver under any greater liability? Apart from his position as an officer of the Court, there is nothing which would impose any greater liability on him; but it is said that where the Court finds its officer in possession, it will compel him to do what is right and honest and honourable in the execution of his duties as officer of the Court, and it is said that it would not be right, honest, or honourable if the

(1) [1900] 1 Q. B. 116.
(2) (1857) 8 D. M. & G. 815.
(3) (1879) 12 Ch. D. 839, 844.
(4) (1881) 44 L. T. 903.
(5) (1889) 34 Sol. J. 97.

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Court abstained from enforcing payment of these sums. Now, I have a difficulty in acceding to that proposition in the abstract. The law of landlord and tenant is perfectly clear. A lessor makes a demise to a lessee on certain terms. The lessee makes an underlease to a sub-lessee on other terms. There is nothing dishonest or dishonourable in the sub-lessee entering on the demised property on the terms contained in the sub-lease, and as between him and his sub-lessor he is entitled to remain in upon those terms. If the terms of the head-lease are more onerous than those of the sub-lease, and the sub-lessor fails to perform them, difficulties no doubt arise, but there is no legal liability on the underlessee to perform the obligations in the superior lease apart from this, that if he fails to perform them he may experience unpleasant consequences, or even find his own lease brought summarily to an end. If, for example, the sub-lessor fails to pay the rent to the superior landlord, the sub-lessee may find his goods distrained on by the superior landlord. So if the power of re-entry arises owing to the sub-lessor not having performed the covenants in the superior lease, the sub-lessee may find himself ejected. But, apart from that, there is no legal obligation on the sub-lessee, and I see nothing contrary to honour and right in the sub-lessee remaining in possession on the terms of the sub-lease. In my opinion, therefore, on general principles, there is no reason why an order should be made against the receiver in this case. But it is said that the Court in certain cases has laid down a rule, from which, if it be a rule, I should be slow to depart, that in these circumstances there is imposed upon the receiver an honourable obligation, which the Court will see carried out. Let us examine the cases. The first series of cases are those in which there has been a liquidation, and part of the company's property consists of leaseholds, and the liquidator continues in occupation. The law as to that is stated by Lindley L.J. in *In re Oak Pits Colliery Co.* (1) as follows: "When the liquidator retains the property for the purpose of advantageously disposing of it, or when he continues to use it, the rent of it ought to be regarded as a debt

(1) 21 Ch. D. 322, 330.

contracted for the purpose of winding up the company, and ought to be paid in full like any other debt or expense properly incurred by the liquidator for the same purpose, and in such a case it appears to us that the rent for the whole period during which the property is so retained or used ought to be paid in full without reference to the amount which could be realized by a distress." That is a rule which has been laid down with respect to dealing with property of which the company in liquidation is the lessee. The landlord ought to be paid by the company on behalf of which the liquidator is acting. But here I am not winding up the company which issued these debentures. I am only assisting the debenture-holders, who stand in the position of equitable mortgagees, to obtain their rights; and, in my opinion, that case is not precisely in point, and does not lay down any general principle applicable to all cases in which a receiver or officer of the Court may find himself in possession of leasehold property as to which he is under no direct obligation to the superior landlord. Cases which approach more nearly to the present case are one or two which have been decided with reference to the possession of receivers. In an Irish case of *Balfe* v. *Blake* (1) a receiver had been appointed in an administration action, and had for several years duly paid to the head landlord of certain lands the head-rent, subject to which the defendant held those lands. The receiver had received from the sub-tenants sums of money considerably exceeding the amount due for head-rent. The head-rent having fallen into arrear, application was made by the landlord that the receiver be directed to pay these arrears, and the Lord Chancellor made the order. He put the case in this way: "This Court," he said, "is bound to act with honesty both to landlord and tenant; and being placed in the position of tenant, to do as a just and honest tenant would do. It holds the rents received from the sub-tenants in usum jus habentium. It is responsible in the first instance to the landlord, it being the primary duty of the tenant, and therefore of the receiver over that tenant's interest, to keep down the head-rent. So clear is the receiver's duty in this

(1) 1 Ir. Ch. Rep. 365, 367.

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respect, that if, in consequence of his default, the landlord is compelled to institute proceedings for the recovery of his rent, the receiver is held liable for costs if rents have reached his hands. The Court is bound to protect all parties, and were it through its officer to apply the rents received from the sub-tenants to purposes other than those to which they ought to be applied, and leave the head-rent unpaid, the landlord might distrain the lands in the possession of the sub-tenants, who would have already paid the receiver. To such a hardship the Court cannot expose them, nor, on the other hand, is it to deprive the landlord of his due. The receiver is the officer upon whom the performance of the obligations imposed by the possession of the land is devolved. His primary duty is to pay the head-rent, and this he is bound to do without any special order of the Court to that effect." And in England there is a case of *Jacobs* v. *Van Boolen* (1) in which the same principle was applied. But on what does that depend? It depends on the principle that the officer of the Court, being placed in the position of a tenant, is bound to do as a just and honest tenant would. How does that apply to this case? Here the position of the officer of the Court is not that of a tenant, but of a sub-tenant, and, as I have said, it is perfectly clear that a sub-tenant is entitled as between himself and the lessor to occupy upon the terms upon which the lessee has granted him the lease, and that he is not bound to pay or perform the covenants which are contained in the head-lease. In this case the principle on which the Irish decision was based does not apply. Then there was also cited the remarkable case of *Neate* v. *Pink*. (2) There the question arose with reference to certain leasehold property in Jamaica. The trustee and executor of A. B., the owner of one moiety of a plantation there, took a lease of the other moiety from E. and F., the owners of it. A suit was subsequently instituted in England by the parties interested under the will of A. B. for the execution of the trusts of the will, and certain persons in Jamaica were appointed receivers and managers of the estates of A. B. These persons entered into

(1) 34 Sol. J. 97.

(2) 15 Sim. 450; 3 Mac. & G. 476.

possession of the entire plantation, and remitted the proceeds to the consignees in England appointed in the suit, and they paid the money so received into court. No rent having been received for many years by E. and F. in respect of their moiety of the plantation, a petition was presented by them for payment out of the funds in court of the arrears of rent, and also of a sum which they claimed in respect of dilapidations during the receivers' occupation. E. and F. were not parties to the suit. It was held by the Court of Appeal that, notwithstanding that some of the parties interested under the will of A. B. were under disability, yet they were bound by the occupation of the receivers, and that E. and F. were entitled to an order for payment of the arrears of rent and to a reference in respect of the dilapidations. It seems to me, looking at the whole of the facts, that the Court came to the conclusion that this leasehold interest in the moiety of the plantation must be treated as belonging to A. B.'s estate, and, once that conclusion is arrived at, there is no difficulty in applying the principle laid down in the Irish case to which I have referred. It was a material circumstance in that case that the landlords had recovered judgment in Jamaica against the receivers for the rent which was due, so that the Jamaica Courts shewed that they treated the relation of landlord and tenant as existing between the owners of that moiety of the property and the receivers. If that were so, there would be clearly a right of indemnity to the receivers out of the estate, and the Court might well have applied that equity and paid the money directly out of the fund. But here again I think that the case is distinguishable, because no claim has been made by the company against the receiver or any one else. Lastly, two cases in bankruptcy (*Ex parte James* (1) and *Ex parte Simmonds* (2)) were referred to in which the Court ordered the trustee in bankruptcy, who had been paid certain funds under a mistake of law, to refund, although an action at law could not have been maintained, and observations were made by James L.J. and Lord Esher M.R. as to the duty of the Court to maintain

(1) L. R. 9 Ch. 609. (2) 16 Q. B D. 308.

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a high standard of honesty. I hope I shall not fall short of maintaining such a standard; but that doctrine must be accepted with some limitations, and I venture to read as part of my judgment a passage from the judgment of James L.J., one of the judges who made the observations I have referred to, in *Ex parte Grissell.* (1) In that case a company was being wound up and there were debenture-holders. Under the sanction of Malins V.-C. an agreement was made between the liquidators and Grissell under which Grissell made an advance to enable the liquidators to carry on the business of the company, and the question arose whether this advance was to be repaid out of the property charged in favour of the debenture-holders. The Vice-Chancellor held that it must be so repaid. Upon the appeal the Lord Justice said this (2): "I am clearly of opinion that there has been some miscarriage on the part of the Vice-Chancellor, probably due to this, that he fancied that he had in some way, acting in the winding-up, induced Mr. Grissell, by sanctioning that agreement, to lay out money, and that he thought, therefore, as he himself expressed it in his judgment, that the honour of the Court was in some way involved, and that it was for the honour of the Court to see that Grissell was paid the moneys which he had been induced by the sanction of the Court to lay out in carrying on the works. But the honour of the Court cannot be satisfied at the expense of somebody else, who is not in point of law or in point of equity bound to satisfy it out of his means. It really comes to the simple question of what was the right of the debenture-holders. It appears that the machinery, plant, and effects (the proceeds of which are now in question) were well and effectually mortgaged to the debenture-holders, and the debenture-holders were, in my opinion, in exactly the same position as any other equitable mortgagees who had lent money to the company." Now, in this case it appears to me that, substantially, I am asked to take the money of the debenture-holders and apply it in payment of debts which the debenture-holders and their trustees are not either at law or in equity

(1) (1875) 3 Ch. D. 411. (2) 3 Ch. D. 419.

liable to pay. This part of the summons must be dismissed with costs.

H. B. H.

Hodgkinson appealed.

The appeal was heard on June 27, 1901.

On the appeal the appellant limited his claim for rent to the half-quarter ending May 9, 1900, when the receiver and manager gave up possession.

*Upjohn*, *K.C.*, *P. F. Wheeler*, and *Begg*, for Hodgkinson, the lessor. The question is whether, where a lessee has mortgaged the demised property to debenture-holders or their trustees by way of sub-demise, and a receiver and manager has been put into possession of the leasehold property on behalf of the debenture-holders, the head-lessor is entitled to have his rent paid out of moneys in the hands of the receiver.

[COLLINS L.J. On what principle do you claim rent from a person who is not in any way in privity with you?]

We admit we cannot claim payment as against the receiver personally; but he has moneys in his hands representing property of the company, who are our lessees. The position of the receiver is analogous to that of a liquidator who is in possession of a company's property: there the rule is that the liquidator must pay, out of moneys coming to his hands, the rent of the property he has been beneficially occupying with the object of making a profit for the company. So, where a person is in the occupation of leasehold business premises under an order of the Court and is carrying on the business for the benefit of certain other persons, the Court will direct that person to pay rent for his occupation to the landlord. That is our equity; and it is quite immaterial whether a sub-lessee or any one else is interposed.

[ROMER L.J. What right have you to claim rent as against either these trustees or their assets? None. Then does it make any difference if the trustees appoint a receiver or have one appointed on their behalf? I conceive not.]

The receiver was appointed originally under the powers in the trust deed, and thus became agent for the mortgagors, the

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company, though appointed by the trustees, the mortgagees: Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 24, sub-s. 2; and therefore, his possession being the company's, their liability to their lessor remained, and their agent's first duty was to pay their rent. The further appointment of the receiver as receiver in the action makes no difference.

[ROMER L.J. I do not think that s. 24 does more than apply as between mortgagor and mortgagee. The agency of the receiver on behalf of the company came to an end on August 29, when he was appointed receiver and manager by an order in the action. Take the ordinary case of a lessee who mortgages the leasehold premises to a mortgagee by sub-demise, and of the mortgagee then bringing an action against the mortgagor to enforce his security and obtaining the appointment of a receiver; no one ever heard of the receiver being ordered to pay rent to the head landlord. Then what difference can it make if the mortgagor is a company?]

The landlord has a right to ask the Court to see that justice is done by ordering the receiver to pay the rent.

[ROMER L.J. You cannot put your right here on the ground that the mortgagor is a company. Can you cite a single authority that where the mortgage is by sub-demise and the receiver in the mortgagee's action has gone in by order of the Court he has been ordered, out of the assets in his hands, to pay rent to the head landlord? I do not think such a case can be found.]

The Court has given the owner of a rent-charge leave to distrain notwithstanding the appointment of a receiver: *Eyton* v. *Denbigh, Ruthin and Corwen Ry. Co.* (1) The primary duty of a tenant, and therefore of a receiver appointed in his interest, is to keep down the rent: "the Court is bound to protect all parties": *Balfe* v. *Blake.* (2)

[ROMER L.J. That seems to have been an ordinary action between mortgagor and mortgagee, and not a case of mortgage by sub-demise.]

We submit that it makes no difference whether the mortgagee is a mortgagee by sub-demise or not. He holds the

(1) (1868) L. R. 6 Eq. 14. (2) 1 Ir. Ch. Rep. 365, 367.

property subject to the terms of the lease, although he may not be personally liable to the head landlord for rent. Here the possession of the receiver having been by the direction of the Court, and he having by order of the Court sold and removed the chattels, we have an equity that out of the moneys in his hands, which are assets of the company, the rent due from the company should be paid. In *Great Eastern Ry. Co.* v. *East London Ry. Co.* (1) it was held that the receiver of the tolls of the defendant company was bound to pay to the plaintiff company rent for the beneficial user of their land in priority to the claims of the debenture-holders.

[ROMER L.J. That was a case of direct liability on the part of the defendant company, not a case of mortgage by sub-demise.]

The true analogy is to be found in a debenture stockholders' case, such as that was, and not in a simple case of mortgagor and mortgagee. We submit that the rent is a charge on these moneys in addition to the existing liability of the mortgagor to distress. *Jacobs* v. *Van Boolen* (2) is a clear decision that a head landlord may apply for his rent.

On principle, the case is precisely similar to that of a liquidator who is in possession of a company's leasehold premises and carrying on business there after a winding-up. In such a case, the landlord being unable to obtain possession, "common sense and ordinary justice require the Court to see that the landlord receives the full value of the property"; and he is therefore entitled to come in before the ordinary creditors: *In re Lundy Granite Co.* (3); *In re Oak Pits Colliery Co.* (4) If the company's goods have been removed so that he cannot distrain, he is entitled to stand in the same position as if the goods had been on the premises; just as the liability for poor-rates or gas-rates stands in priority to the debenture-holders, although the receiver is in occupation: *In re Marriage, Neave & Co.* (5); *Paterson* v. *Gas Light and Coke Co.* (6)

A lessor is entitled to be satisfied for the occupation of his

(1) 44 L. T. 903.
(2) 34 Sol. J. 97.
(3) L. R. 6 Ch. 462, 466.
(4) 21 Ch. D. 322, 330.
(5) [1896] 2 Ch. 663, 674.
(6) [1896] 2 Ch. 476.

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land, and the Court will not set an example of dishonesty and refuse to compensate him for the occupation of his property merely because he happens to be prevented by a legal difficulty from asserting what is his plain right: *Neate* v. *Pink*. (1) We admit that there is no personal liability on the part of the receiver or of the trustees to pay the head landlord's rent, but the Court will compel its own officer to do what is honest and just, that is, before paying over his gross earnings, to pay the rent for his beneficial occupation, for qui sentit commodum sentire debet et onus. The test is, Has there been an occupation for the benefit of the debenture-holders? If so, we are entitled to rent for the half-quarter, which is all we now claim, and also to a sum for dilapidations.

*Martelli*, for the receiver and manager and the trustees, was not called upon.

RIGBY L.J. In my opinion, for the reasons given by Stirling J. in the judgment that has been read, the claim cannot be allowed, and the appeal must be dismissed with costs.

COLLINS L.J. I am of the same opinion. [His Lordship then stated the facts, and continued:—] The landlord having lost the opportunity of distraining for his rent, applied that the receiver might be ordered to pay the rent out of the moneys in his hands arising from the sale of the chattels; but Stirling J. decided that the landlord had no right, either in law or in equity, to require the receiver to make good, out of the moneys in his hands, rent for the time he had been in the use and occupation of the premises. With that I agree. Mr. Wheeler, who has argued the case with great ingenuity, admitted that there is no privity of estate, and therefore no liability for rent, as between the head-lessor and the sub-lessees, the trustees; but then comes the main basis of his contention. He says that the Court has assisted the debenture-holders by putting in its own officer as receiver, and that therefore a new right arises in favour of the lessor as against the receiver. Let us examine

(1) 15 Sim. 450; 3 Mac. & G. 476.

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the basis of that alleged right. It is admitted that the trustees themselves are under no liability: for what reason, then, should the lessor be in a better position because a receiver is substituted for the trustees? I can see none. Suppose that there had been no receiver and that the trustees, the sub-lessees, had done all that the receiver had done, the landlord would have had no legal remedy as against them on the covenants for the rent, and no actual remedy by distress unless put in before the removal of the goods. Then, upon the receiver being appointed and going into possession on behalf of the trustees, the landlord could not shew that any additional benefit accrued to him by the receiver being substituted for the trustees. The only point in the argument that impressed me at all was that the landlord was sustaining some damage by the action of the Court. By the appointment of a receiver the rights of the landlord are suspended through the action of the Court. So far as the Court interferes by the appointment of a receiver to prevent a landlord from exercising his rights, there may be some shadow of a ground for suggesting that the receiver should make good the loss the landlord has thereby sustained. But no authority has been cited to shew that a receiver has ever been ordered to do anything of the kind, and it is not our province to create a new equity. Up to that point I follow Mr. Wheeler's argument, but it is sufficient to say that the Court does not profess to cure every inconvenience arising from its action in appointing a receiver.

The cases that have been cited have all been distinguished by Stirling J. in his judgment. Broadly, they are cases of direct liability between lessee and lessor. In none of them is there any question about liabilities as between lessor and sub-lessee. In my opinion a lessor acquires no right either at law or in equity by reason of a receiver being appointed in substitution for the sub-lessee; and as to the receiver for the sub-lessee being bound to put the lessor in the same position as if the receiver had been put into possession on behalf of the lessee and the goods had been on the premises, there is no authority carrying the appellant's case to that extent. I therefore agree that the appeal should be dismissed.

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ROMER L.J. I agree. I think this appeal fails for the reasons given by Stirling J. in the Court below and by my brother Collins L.J.

The case has been very well argued by Mr. Wheeler, and none the less because I pressed him somewhat in argument. I only wish to add a few words upon the authorities. In all of them you will find that they are based upon the principle I am about to state. If you have a company or person whose estate is being dealt with or administered by the Court, and a liquidator or receiver appointed by the Court has occupied or used premises that are part of the estate, then, as to rent and other outgoings payable to the landlord or other parties in respect of the premises for that occupation or user and for which the company or person whose estate is being dealt with or administered is liable, the Court will see that such rent and other outgoings are paid out of the assets got in by the liquidator or receiver. But that principle does not and cannot apply to cases as between mortgagor and mortgagee when the mortgaged premises are leasehold demised or agreed to be demised by the mortgagor to the mortgagee, or charged by the mortgagor in favour of the mortgagee in such a way that the mortgagee is not liable to pay rent or other outgoings either to the mortgagor or to the mortgagor's landlord. In such a case the liquidator or receiver is appointed in right of the mortgagee. The Court is not administering the mortgagor's estate: it is only dealing with the mortgaged property, and the mortgaged property, it is to be borne in mind, involves in itself ex hypothesi no liability to the landlord whatever. It must be remembered that in such a case, a case as between mortgagee and mortgagor, the latter remains liable to rent, even if the mortgagee is in possession; and that the mortgagee on going into possession, even though remaining in possession and paying no rent, does not become liable, in respect of such occupation, to the landlord for rent.

Is the matter changed by the mortgagee getting a receiver appointed? Not at all. The appointment of a receiver does not take away from the mortgagor his primary liability. The mortgagor remains liable, not the mortgagee, nor the receiver,

nor the mortgaged property. The landlord has no claim as against the mortgagee or the receiver, or the mortgaged property during the occupation by the receiver. Of course, in a case where the landlord, by reason of his not being paid or of his covenants not being complied with, has a right to complain and to re-enter, he can apply, notwithstanding the appointment of a receiver, and obtain leave from the Court to re-enter, and so take away from the receiver his right of occupation; and he can also, in a proper case, get leave to distrain: but the mere appointment of a receiver does not of itself, in my opinion, give the landlord any special rights, and has never, so far as I know, been held to do so.

There is no authority whatever in support of the proposition that in such a case as I have indicated, a case between an ordinary mortgagee of leaseholds by sub-demise and an ordinary mortgagor of such leaseholds, where a receiver has been appointed in an ordinary action by the mortgagee to enforce his security, the landlord can apply to have his rent paid out of the assets coming to the hands of the receiver during his occupation. For the reasons I have stated, that would be contrary to principle. As to the argument that there is something in the nature of honesty and common justice requiring the Court to interfere, that is only a plea ad misericordiam which cannot be supported by any legal or equitable right, and it has been sufficiently dealt with by Stirling J. The question here is a mere question of a legal right, and if the applicant has no right to make the application, there is no dishonesty on the part of the Court in refusing to comply with it: and the mere fact that the mortgagor happens to be a limited company can make no difference. If the applicant is right here—which, in my opinion, he clearly is not—a general principle would have to be laid down by the Court applicable to all cases between mortgagor and mortgagee. On principle, in my judgment, no such order as is now asked for ought to be made, and therefore this appeal must be dismissed with costs.

Solicitors: *Duffield, Bruty & Co.; H. E. Warner & Co.*

G. I. F. C.

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## INDERWICK *v.* TATCHELL.

[1900 I. 1041.]

## TATCHELL *v.* TATCHELL.

[1900 T. 1231.]

## INDERWICK *v.* INDERWICK.

[1900 I. 1410.]

*Will—Construction—Survivor.*

A testator by his will gave seven portions of his real and leasehold property in trust for his seven children for their respective lives, and upon their respective deceases upon trust to convey to their respective children then living as tenants in common absolutely, provided always that, in the event of any of the testator's children dying without leaving children entitled to take under the will, the shares of such children, both original and accruing under the present clause, should go to their then surviving brothers and sisters, if more than one, as tenants in common for their respective lives, and after their respective deceases to their respective children in the manner thereinbefore provided with respect to his said children's original shares; and if there should be but one such surviving brother or sister, then to him or her absolutely. Of the seven children (all of whom survived the testator), three sons died without issue, then a fourth son died leaving children him surviving, then a daughter died without issue :—

*Held*, that the word "surviving" ought to bear its natural meaning, and that the children of the deceased son were not entitled to participate in the daughter's share.

*Semble*, there is no such rule of construction as that thirdly stated by Kay J. in *In re Bowman*, (1889) 41 Ch. D. 525, 532.

*Harrison* v. *Harrison*, ante, p. 136, approved.

Appeal from a decision of Kekewich J.

John Inderwick by his will, dated April 17, 1867, subject to certain legacies therein bequeathed, gave all his freehold and leasehold lands, messuages, and tenements to trustees, as to certain of them, upon trust to pay to his son Edward, or permit him to receive, the rents thereof during the term of his natural life; and from and immediately after his decease upon trust to convey the same for all the testator's estate, term, or

interest therein unto the children of the testator's said son Edward by his first wife, if more than one, who should be then living in equal shares as tenants in common; and if there should be but one such child, then to convey the same unto such one child.

And the testator gave six other portions of his real and leasehold property upon similar trusts for the benefit of his six other children, John, George, Walter, Ann (the wife of Joseph Lindner, since deceased), Louisa, and Emily (the wife of Joseph Tatchell), and their respective children. The will then proceeded as follows: "Provided always and it is my will that in the event of any or either of my said children dying without leaving children or a child respectively entitled to their his or her share under this my will then the respective share or shares of such my said child or children both original and accruing under the present clause or provision shall go and be divided paid and applied to and amongst his her or their then surviving brothers and sisters if more than one in equal shares and proportions as tenants in common for their respective lives and after their respective decease to and amongst their respective children in the manner hereinbefore provided with respect to my said children's original shares or bequests and interests and in addition to those original shares or bequests and interests. And if there shall be but one such surviving brother or sister then to him or her absolutely and to whom I do hereby give devise and bequeath the same accordingly. . . . Provided always and I do hereby declare that in respect to the several estates and parts or shares of my estates both freehold and leasehold hereinbefore devised and bequeathed to or in trust for my several children hereinbefore mentioned and which are to take effect for their benefit and to be had received and taken by them during the term of their natural lives and which after their respective deceases are hereinbefore devised and bequeathed to or in trust for their respective children who may survive them It is my will and I do hereby direct that in the event of any or either of my said children departing this life without leaving any child or children him or her surviving but leaving a grandchild or grandchildren him or her surviving then the

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estates parts shares and property wherein my said child or children shall have been so interested as aforesaid shall go and be conveyed assigned and assured unto such grandchild or grandchildren respectively in equal shares and proportions if more than one as tenants in common for all my estate term and interest therein and to whom I hereby give devise and bequeath the same accordingly." Then followed a further clause (hereinafter referred to as the 2nd clause of accruer) to the following effect: "But if there shall be no such then surviving grandchild or grandchildren then it is my will and I do hereby declare and direct that the estate part share and property of my said deceased child or children respectively whether original or accruing shall go and be conveyed assigned and assured unto and equally between his her or their then surviving brothers and sisters in equal shares as tenants in common if more than one and if there shall be but one of my children then surviving the whole of such accruing part share estate and property shall go and be conveyed assigned and assured to that one his or her heirs executors administrators or assigns and to whom I hereby give devise and bequeath the same accordingly."

The will also provided that the testator's daughters should take their shares for their separate use, and that none of the testator's children, whether male or female, should have power to anticipate or sell or assign their shares under pain of forfeiture, as therein mentioned.

The testator died on November 15, 1867, leaving his seven children him surviving.

Three sons of the testator, namely, John, George, and Walter, died without issue in 1868, 1874, and 1876 respectively.

Edward died in 1899, having had five children by his first wife, of whom four survived him, and one, Alfred, predeceased him, leaving two children him surviving.

The testator's daughter Louisa died a spinster on January 12, 1900. At this date the only two surviving children were Mrs. Tatchell, who had several children living, and Mrs. Lindner, who was a widow without issue.

By a deed of family arrangement dated August 14, 1877, and

made between Edward Inderwick of the first part, Mr. and Mrs. Lindner of the second part, Louisa Inderwick of the third part, Mr. and Mrs. Tatchell of the fourth part, and the five children of Edward of the fifth part, after reciting that doubts had arisen upon the construction of the will of the testator as to the effect of the 2nd clause of accruer, and whether it was not inconsistent with the 1st clause of accruer, and especially whether, having regard to the terms of the 2nd clause of accruer, a share accruing to a son or daughter of the said testator would, in the event of such son or daughter having issue, devolve on such issue in manner provided by the previous clauses of the will, or would in that event vest absolutely in such son or daughter, and that it was believed that the real intention of the testator was correctly expressed in the 1st clause of accruer, and in the subsequent clause providing for the event of the testator's children leaving grandchildren only, and that the parties of the first four parts were desirous of giving effect to such presumed intention; and after reciting that the children of Edward, the parties of the fifth part, were desirous of modifying the trusts declared in the will to take effect on the death of their father in manner thereinafter appearing, it was witnessed that the parties of the first four parts according to their several and respective interests, and so far as they respectively were able so to do without incurring a forfeiture of any interest to which they were then or might thereafter become entitled under the will, thereby agreed that the said will should, as well in respect of shares which had already accrued as in respect of shares which might thereafter accrue, be read as if the 2nd clause of accruer had not been contained therein; and it was further witnessed that the parties of the fifth part according to their respective interests, and so far as they were respectively able so to do without incurring a forfeiture, agreed that in case any of them should die in the lifetime of their father, Edward Inderwick, leaving children who should be living at the date of the decease of the said Edward Inderwick, such children should take the share which their deceased parent would have taken if he or she had survived the said Edward Inderwick.

Upon the death of Louisa Inderwick the surviving children

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of Edward and the two children of his deceased son Alfred commenced the first of the above actions against Mr. and Mrs. Tatchell and their children and Mrs. Lindner for the purpose of (among other things) determining whether under the will and the deed of arrangement the plaintiffs were entitled to participate in Louisa's share, original and accrued, or whether the share was divisible between the defendants, Mrs. Tatchell and Mrs. Lindner, in moieties to be held in trust for them for their respective lives.

Kekewich J. held upon the construction of the will that the plaintiffs were not entitled to participate.

The plaintiffs appealed.

*Swinfen Eady, K.C.*, and *Dauney* (*P. O. Lawrence, K.C.*, with them), for the plaintiffs. In this case the word "surviving" ought to be read, not in its primary sense of surviving in person, but in its secondary sense of surviving in stock, in accordance with the principle laid down in *Waite* v. *Littlewood* (1).

[ROMER L.J. In *Waite* v. *Littlewood* (1) there was an ultimate gift over.]

*In re Bowman* (2) shews that that is not necessary where, as in this case, there is a direction that the accrued share shall be settled in the same manner as the original share. This case comes within the third rule there stated by Kay L.J. as the result of the authorities. It is true that in *Harrison* v. *Harrison* (3) Cozens-Hardy J. declined to follow that rule, on the ground that it was inconsistent with *Beckwith* v. *Beckwith* (4) and *In re Benn* (5); but we submit that there was not in fact any such inconsistency as alleged.

[They also referred to *In re Bilham.* (6)]

*Warrington, K.C.*, and *S. Dickinson*, for the defendants.

LORD ALVERSTONE C.J. In this case I think that Kekewich J. has arrived at the right decision. I need scarcely say that, if it were necessary for me to deal with the various

(1) (1872) L. R. 8 Ch. 70.
(2) 41 Ch. D. 525, 532.
(3) Ante, p. 136.
(4) (1876) 46 L. J. (Ch.) 97.
(5) (1885) 29 Ch. D. 839.
(6) Ante, p. 169.

authorities that have been cited, I should feel the greatest difficulty in doing so; and if I thought that this case depended upon any general rule to be deduced from those cases, as, for instance, the general rule laid down by Kay J. in *In re Bowman* (1), I should have required further argument; and, speaking for myself, a great deal more time for consideration. In my view, the general result of the authorities is that, at any rate for the purposes of this case, there is no such hard and fast general rule which would force us to put a construction which I think the words of the will itself, without it, do not bear. The cases of *Eyre* v. *Marsden* (2) and *Beckwith* v. *Beckwith* (3), which were referred to, turned upon the terms of the particular wills; and the judgments, first, of Baggallay L.J. in *Beckwith* v. *Beckwith* (3), and then of Cotton L.J. in *In re Benn* (4), shew clearly that in their opinion there was no such general rule, and that the rule which had been applied in such a case as *Waite* v. *Littlewood* (5) depended upon considerations which are not material for the purposes of the present case. I say no more about them, because I should not serve any useful purpose by discussing those authorities. I only refer to the judgments of Baggallay L.J. and Cotton L.J. because they seem to me to negative the view that there is any general rule which would apply to this particular case. Lastly, with regard to the supposed general rule, you have only to read the judgment of Kay J., remembering it was founded on those two cases of *Eyre* v. *Marsden* (2) and *In re Beck's Trusts* (6), and the subsequent judgments of Cozens-Hardy J. in *Harrison* v. *Harrison* (7) and Joyce J. in *In re Bilham* (8), to see how extremely difficult it is to say that there is any general recognised principle or general rule which might force us, so to speak, to put a different construction upon the words than their natural meaning, assuming that we look at the terms of the will only. I decide this case upon the terms of this will, and I come to the conclusion, upon the terms of this will, that in the

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(1) 41 Ch. D. 525, 532.
(2) (1839) 4 My. & Cr. 231; 48 R. R. 73.
(3) 46 L. J. (Ch.) 97.
(4) 29 Ch. D. 839.
(5) L. R. 8 Ch. 70.
(6) (1867) 16 W. R. 189.
(7) Ante, p. 136.
(8) Ante, p. 169.

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clause to which Mr. Swinfen Eady has directed our attention the words "their then surviving brothers and sisters" meant their then surviving brothers and sisters, and did not mean to include the stirps of a predeceased brother or sister. I may be wrong, but I should have thought, apart from authority, that such words as "then surviving brothers and sisters" ought to receive their natural meaning, and that you ought not to turn the word "surviving" into "other" brothers and sisters, whether surviving or not, unless there was something in the will to lead you to the conclusion that the word "surviving" was to be construed as "other"; and, speaking for myself, I still think that such words ought to have their natural meaning unless from the whole of the will, or from other clauses in the will, there is an indication that they are to have a different meaning. I do not find in this will any such indication that they are not to have their natural meaning.

[His Lordship then discussed the terms of the will, and said that there were two clauses in it which confirmed his view that the testator was using the words "then surviving brothers and sisters" in their natural sense: first, the clause which provided that the share of any child dying without leaving children entitled to take should, in the event of there being only one brother or sister surviving, go to him or her absolutely; and, secondly, the clause providing for the event of there being no grandchild entitled to take under the will. He therefore thought that the appeal should be dismissed.]

VAUGHAN WILLIAMS L.J. I agree. It was not disputed on behalf of the appellants that if you construed the words literally they had no case. But it was suggested that the words were not to be construed literally. It was suggested that you ought to put a construction upon these words in accordance with what I will call Kay J.'s third rule in *In re Bowman*. (1) But against that it affords me, I must say, some satisfaction to say that it seems difficult, or, as Cozens-Hardy J. expresses it, beyond the wit of man, to discover any rule which will guide you as to when you are to construe the

(1) 41 Ch. D. 525, 532.

word "surviving" literally. That being so, one really has to look at the will and ascertain what was the intention of the testator. I do not suppose that at any time, however much the tide might be in favour of literal construction, it could be said that you are to follow literal construction if, from the four corners of the will, you can ascertain that the literal construction would be contrary to the intention of the testator. But we seem in this case to have arrived at this point—that there is no hard and fast rule to enable you to say when you are to follow the literal construction and when you are not. It is a matter always of the intention of the testator, to be ascertained from the whole of a will. In this case I entirely agree with what the Lord Chief Justice has said as to the intention of the testator. I think for the reasons he has given it is clear here that the testator intended what he said, and I have nothing to add to those reasons.

ROMER L.J. I agree that in this will the words "surviving brother and sisters," the words used by the testator, are used by him in their primâ facie and literal sense, and that there is nothing in this will to justify us in holding that the words are to have a secondary, or more extended, meaning. I should like to add that I also think there is no such fixed rule of construction as that which is called the third rule in the case of *In re Bowman* (1), and I have nothing to add on that point to what was said by my brother Cozens-Hardy in his judgment in the case of *Harrison* v. *Harrison*. (2)

Solicitors: *Collisson, Prichard & Barnes; Garrard, James & Wolfe.*

(1) 41 Ch. D. 525, 532.

(2) Ante, p. 136.

H. B. H.

C. A. 1901 Oct. 31; Nov. 1.

## *In re* BARROW HÆMATITE STEEL COMPANY.

*Company—Reduction of Capital—Confirmation by Court—Preference and Ordinary Shareholders—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 11 —*Companies Act*, 1877 (40 & 41 *Vict. c.* 26), *s.* 3.

Decision of Cozens-Hardy J., [1900] 2 Ch. 846, dismissing a petition for the confirmation by the Court of special resolutions for the reduction of the capital of a company, affirmed, on the ground that the evidence did not prove a loss of capital to the extent alleged in the resolutions.

The Court of Appeal declined to express an opinion upon any of the points of law dealt with by Cozens-Hardy J.

APPEAL against the decision of Cozens-Hardy J. (1)

The above company presented a petition for the confirmation by the Court of special resolutions for the reduction of the capital of the company by the sum of 764,000*l.*, which was alleged to have been lost. The capital consisted of ordinary shares and preference shares. The preference shareholders were entitled to a cumulative preference dividend, but they had no preference as regarded capital, and they were not entitled to vote at the meetings of the company, or to interfere in any way in the company's proceedings. A majority of the preference shareholders opposed the reduction. It was proposed by the resolutions to reduce all the shares—ordinary and preference—by 50 per cent.

In support of the petition the evidence of valuers was adduced to the effect (inter alia) that the company's iron ore mines had become depreciated in value to the extent of 177,000*l.*, and that their works had fallen in value to the extent of 486,000*l.*

In estimating the total amount of the alleged loss, the company had not included among their assets a sum of 40,000*l.* which stood in their books to the credit of a reserve fund, or a sum of about 90,000*l.* which stood to the credit of profit and loss, nor had they included anything for the value of the goodwill of their business. The company were able to pay

(1) [1900] 2 Ch. 846.

dividend out of profits if no regard was paid to the loss of capital, and they had in fact been paying dividends.

Clause 106 of the company's articles of association provided that the directors should have power (inter alia), (10) "to set aside out of the profits of the company, before recommending any dividend, such sums as they think proper as a reserve fund to meet contingencies, or for equalizing dividends, or for repairing, renewing, improving, and maintaining any of the property of the company, and for other purposes, as the directors shall in their discretion think conducive to the interests of the company."

Cozens-Hardy J. dismissed the petition, and in so doing he said: "I think I might dispose of the petition on the short ground that the company have not satisfied me that items 1 and 2" (i.e., the 177,000*l.* and the 486,000*l.*) "are proved." The learned judge further expressed an opinion that the 40,000*l.*, the 90,000*l.*, and the goodwill ought to be regarded as available assets for the purpose of a reduction petition, and he said: "For all these reasons I think that the company have not proved that 764,000*l.* is capital lost or unrepresented by available assets, and it follows that I cannot confirm the reduction." His Lordship went on to say that, even if the loss of 764,000*l.* had been established, he should not have thought it right to confirm the reduction. The company was making large and increasing profits from its trading, and, having regard to prior decisions, they had properly paid dividends out of the profits, notwithstanding the loss of capital. The earning capacity of the company would not be increased by the reduction of the capital, and he did not think he ought to allow an unnecessary reduction for the avowed purpose of relieving the ordinary shareholders from the burden of preferential interest. He thought the proposed reduction would not be fair and equitable as between the preference and the ordinary shareholders.

The company appealed. The appeal came on for hearing on October 31, 1901.

*Swinfen Eady, K.C.*, and *Cassel*, for the company.

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BARROW HÆMATITE STEEL COMPANY, *In re.*

*Eve*, *K.C.*, and *Kirby*, for preference shareholders, were stopped by the Court.

*Hon. E. C. Macnaghten*, *K.C.*, and *Simey*, for shareholders holding both preference and ordinary shares.

*Swinfen Eady*, *K.C.*, in reply.

The arguments were similar to those used in the Court below. It is not considered necessary to repeat them, because the Court expressly declined to decide any point of law.

In addition to the cases cited in the Court below, *Dovey* v. *Cory* (1) was referred to.

LORD ALVERSTONE C.J. In my opinion Cozens-Hardy J. did base his decision upon the facts, for he said distinctly: "I might dispose of the petition on the short ground that the company have not satisfied me that items 1 and 2 are proved." I have looked at the affidavits as to value, which are made by men of position, and, though no doubt it is to a great extent a matter of opinion, if I had been sitting as a judge of first instance I should have had the greatest difficulty in coming to the conclusion that, assuming the accuracy of all the figures put forward by the valuers, there has been a loss of capital to the extent of 764,000*l.* I do not intend and I ought not to express any final opinion as to the way in which the two sums of 40,000*l.* and 90,000*l.* ought to be dealt with; but, having regard to clause 106 (10) of the articles of association, it seems to me impossible to say that the loss of 764,000*l.* is established without knowing in what manner those large sums are going to be dealt with. The only ground on which I decide this case is that I am by no means satisfied that Cozens-Hardy J. has come to a wrong conclusion in holding that a loss of capital to the extent alleged has not been established. There I stop for the purpose of my decision.

But I wish to add one or two observations upon the judgment of Cozens-Hardy J. I do not understand him to have

(1) [1901] A. C. 477.

decided anything adverse to a pro ratâ reduction of capital in a proper case, nor that simply because the company were paying dividends there could not be a reduction. I understand his judgment to amount to this, that in view of the facts he did not think the proposed reduction was justified. I do not understand him as saying that upon different materials a reduction of the capital of this company could not be justified, or that the mere fact that dividends were being paid was a bar to any reduction, and it is in that sense that I understand him to have said that the reduction was "unnecessary." I am of opinion that upon the facts in evidence we ought not to differ from Cozens-Hardy J., and that we ought not to hear an argument on points of law which in our view of the facts do not arise. In my opinion the appeal should be dismissed.

VAUGHAN WILLIAMS L.J. I understand that the judgment of my learned brethren is based on this, that there is not sufficient evidence to establish the alleged loss of capital, and I assent to their judgment. It must not be assumed that, if I had been hearing this case by myself, I should have thought that the evidence of the loss was insufficient, and I feel some doubt whether Cozens-Hardy J. really decided the case on that ground. Indeed, I doubt whether he had quite made up his mind as to what conclusion he ought to draw from the evidence. Be that as it may, my brethren think that the evidence is insufficient, and under those circumstances it is not for me to differ from them.

I understand that by our judgment we are not dealing with any point of law, and I decline to express any opinion about the appropriation of the two sums of 40,000*l.* and 90,000*l.*, or whether upon an application for reduction of capital the fact that the company happens at that time to be paying dividends ought to be taken into consideration. We are not called upon to decide those points now.

ROMER L.J. In my opinion the evidence does not prove that there has been a permanent loss of capital of this company to the extent mentioned in the resolutions. Indeed, I

C. A. 1901 BARROW HÆMATITE STEEL COMPANY. *In re.* Romer L.J.

am unable upon the evidence before us to satisfy myself what permanent loss of capital has been incurred, though it is possible there has been some such loss. I have no doubt, therefore, that the resolutions ought not to be confirmed, and that the appeal ought to be dismissed. This being so, I do not think it right to express any opinion upon any points of law which might have arisen if we had taken a different view of the evidence. I desire to remain perfectly free to deal with any such points of law whenever they may arise for decision.

Solicitors: *Currey, Holland & Currey; Walker & Pettitt.*

W. L. C.

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STIRLING J. 1900 *June* 19, 20. STIRLING L.J. *Nov.* 30. 1901 *April* 17; *July* 31.

## *In re* THE ALMS CORN CHARITY. CHARITY COMMISSIONERS *v.* BODE AND ANOTHER.

[1899 A. 1422.]

*Charity—Annual Payment of Corn to Poor of Parish—Charge on Great Tithes—Inclosure Act—Lands allotted in lieu of Tithes—Sale of Lands—Lands subject to Charge—Mortgagee—Notice of Charge—Inclosure Act*, 1830 (11 *Geo.* 4, *c.* 4), *ss.* 37, 66—*Charitable Trusts* (*Recovery*) *Act*, 1891 (54 *&* 55 *Vict. c.* 17)—*Conveyancing Act*, 1882 (45 *&* 46 *Vict. c.* 39), *s.* 3, *sub-s.* 1 (*ii.*).

In 1881 the defendant purchased from the Ecclesiastical Commissioners certain lands which, in 1834, had been allotted to their predecessors in title under the Inclosure Act, 11 Geo. 4, c. 4, in lieu of the great tithes of the parish of H. There was evidence that from time immemorial an annual payment of a certain quantity of corn had been made out of the tithes for the benefit of the poor of the parish, and from 1834 to 1881 the same payment had been made by the owners or occupiers of the lands in question. The conveyance to the defendant was expressed to be made "free from incumbrances," but was also expressly subject to the unredeemed land tax, tithe commutation rent-charge, both rectorial and vicarial, and to all other payments and outgoings, ecclesiastical or civil, charged upon or payable out of the lands conveyed:—

*Held*, that the payment of corn constituted a valid charge to which the lands allotted in lieu of the tithes became subject by virtue of s. 66 of the Inclosure Act, and that the defendant by the terms of his conveyance took the lands subject to the charge.

The defendant had mortgaged the lands by a deed which expressly

stated in terms similar to those used in the conveyance that the mortgage was subject to all payments and outgoings, ecclesiastical or civil, charged upon or payable out of the mortgaged property. The mortgagee had made no inquiry as to the existence of any charges upon the property :—

*Held*, that, having regard to s. 3, sub-s. 1 (ii.), of the Conveyancing Act, 1882, the mortgagee must be taken to have had notice of the charge in question, and that the mortgaged property was subject thereto.

THIS was an originating summons taken out by the Charity Commissioners under the Charitable Trusts (Recovery) Act, 1891, against Jane Elizabeth Bode and Emma Robertson, asking for a declaration that certain lands containing about 278 acres, now belonging to or in the possession of the defendants, situate in the parish of Haddenham, in the county of Buckingham, being part of the land allotted by an award under the Act 11 Geo. 4, c. 4, to the dean and chapter of Rochester in satisfaction and discharge of the great tithes of the parish of Haddenham, were liable to the payment of a perpetual rent-charge or payment of one quarter of wheat and two quarters of barley per annum for the benefit of the poor of the said parish ; and if necessary that the land so liable might be ascertained and distinguished, or the equivalent in value set out. The summons further asked that an account might be taken of what was due in respect of arrears of the said charge or payment, and that the defendants might be ordered to pay the amount or value of what should be found due to the official trustees of charitable funds, and to pay the costs of the action, or that the arrears might be raised out of the said hereditaments by mortgage or otherwise as the Court should think proper.

Under s. 5 of the Charitable Trusts (Recovery) Act, 1891, the following statements in the Charity Commissioner's Reports for 1833, which are by the Act made evidence, were verified by the affidavit of Mr. D. R. Fearon, C.B., Secretary of the Charity Commissioners.

Mr. Fearon in his affidavit stated :—

"The report in the above-named charity in the Reports of the Commissioners for inquiring concerning charities in

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England and Wales (vol. 26, p. 79, dated January 10, 1833) is as follows :—

"'Unknown donor.'

"'There is a tablet in the parish church of which the following is a copy :—

"'"Benefactions to the poor. One quarter of wheat and two quarters of barley paid annually out of the great tithes of this parish to be distributed every Good Friday."

"'There is a similar entry in a parchment roll, purporting to be an account of benefactions, signed by the curate and churchwardens and exhibited before the archdeacon on the 17th May, 1783, and in the Parliamentary Returns of 1786 this charity is stated to be for the benefit of those poor only who do not receive alms.

"'One quarter of wheat and two quarters of barley are regularly received by the churchwardens from John Franklin, the tenant of the great tithes, every year, and by him distributed about Good Friday to poor persons not receiving parish relief in shares varying according to the size of their families from one quarter of a peck to a peck.

"'The great tithes belong to the dean and chapter of Rochester.'"

It appeared that in 1834 an award was made under the above-mentioned private Inclosure Act of 1830 (11 Geo. 4, c. 4) intituled "An Act for inclosing lands and extinguishing tithes in the parish of Haddenham, in the county of Buckingham," whereby lands containing 348 acres were allotted to the dean and chapter of Rochester in satisfaction and discharge of the great tithes of which they were owners.

Sect. 37 of the Inclosure Act provided that the Commissioners under the Act should allot to the dean and chapter of Rochester and their lessee and successors, and to the vicar of the parish of Haddenham, "for and in lieu and satisfaction of and for the several and respective rectorial and vicarial tithes generally arising, issuing, and renewing out of all and every" the common fields and waste grounds in the said parish, and out of the lands held in severalty within the same parish which

were "subject to tithes," parcels of the said commonable lands, which parcels should be "in full satisfaction and discharge of and for the said several rectorial and vicarial tithes arising, issuing, and renewing from and out of" the said commonable lands and the said lands held in severalty in the said parish.

Sect. 66 enacted that nothing in the Act should extend or be construed to extend to revoke, make void, alter, or annul any will or settlement, whether already operative or ambulatory, or thereafter to take effect, or to prejudice any person or persons having any right or claim of dower, jointure, portion, debt, rent, or incumbrance out of, upon, or affecting any of the messuages, buildings, lands, or grounds to be divided, allotted, inclosed, or exchanged as aforesaid, or any part or parts thereof respectively, but the respective persons to whom any lands or hereditaments should be allotted or awarded in exchange by virtue of this Act should be seised thereof to such and the same uses and for such and the same estates, and subject to such and the same wills, limitations, conditions, settlements, uses, trusts, powers, provisos, rents, debts, charges, and incumbrances, and no other as the several messuages, buildings, lands, grounds, and other hereditaments whereof such persons were seised or possessed at or immediately before the execution of the award to be made by the said Commissioners, and for or in respect whereof such allotments or exchanges should be made, would have been subject to and charged with or affected by in case this Act had not passed.

In 1866 the lands so awarded to the dean and chapter passed to the Ecclesiastical Commissioners, and continued vested in them until 1881, when they sold 278 out of the 348 acres to Henry Bode.

The conveyance to him was dated November 17, 1881. It recited that the Commissioners were seised of the lands in question for an estate of inheritance in fee simple free from incumbrances, and that they had contracted with Bode for the absolute sale to him of such lands and the inheritance thereof in fee simple in possession free from incumbrances at the price of 14,000*l.* By the operative part the lands were conveyed to Henry Bode, his heirs and assigns, "subject to the unredeemed

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land tax and tithe commutation rent-charge, both rectorial and vicarial, and to all other payments and outgoings ecclesiastical and civil charged upon or payable out of the said" hereditaments. The Ecclesiastical Commissioners covenanted in the usual way against incumbrances, and then followed this proviso: "Provided always, and it is hereby agreed and declared by the said Ecclesiastical Commissioners for England (but not so as to constitute a covenant binding their common fund), that a competent part of the great or rectorial tithe rent-charge more particularly mentioned in the 2nd schedule hereunder written shall stand and be charged with the liability (so far as the same now exists) to repair the chancel of the parish churches of Haddenham, Cuddington, and Kingsey in exoneration of the lands and hereditaments" conveyed by the deed.

Evidence was given of payments in money in respect of this outgoing from 1847 to 1862, and in 1864, and of payments in kind from 1865 to 1880, and also in the years 1885 to 1897.

By an indenture dated November 18, 1881, Henry Bode mortgaged the lands in question to three persons to secure the repayment of 14,500*l.* paid by them out of moneys belonging to them on a joint account. By this deed the lands in question were conveyed by Bode to the mortgagees by way of mortgage, but subject to the unredeemed land tax and tithe commutation rent-charge, both rectorial and vicarial, and to all other payments and outgoings, ecclesiastical or civil, charged upon or payable out of the said lands. The defendant Emma Robertson was the sole survivor of the mortgagees, and she was now in possession of the mortgaged property.

In 1884 a dispute arose between the vicar and churchwardens (the trustees of the charity) on the one hand, and Mr. Bode on the other, as to the payment of the charges in question; but on November 8 in that year he informed the vicar and churchwardens that he had decided not to contest the claims, and he made the payments up to the time of his death. In 1898 the defendant Jane Elizabeth Bode, his widow, who had succeeded to the lands, refused to continue the payment, and this summons was then taken out against her.

Subsequently the mortgagee, Emma Robertson, was added as a defendant. She filed an affidavit by her solicitor, who stated that at the time of the carrying out of the mortgage no notice of the charge was given to him, nor was he aware of the existence of the charity.

The defendants also put in evidence an inquisition made under the statute of Elizabeth in the time of James I. (1623–4), whereby it was presented that certain amounts of corn, &c., yearly issuing and payable, due and belonging to the poor people of the town or hamlet of Cuddington—an adjoining hamlet to the parish of Haddenham—out of the rectory or parsonage impropriate of Cuddington, which was parcel of the possession of the dean and chapter of Rochester, and then in lease for many years to come—had theretofore time out of mind until about thirty years since been duly paid and allowed yearly by the owners or occupiers for the time being of the said parsonage in such sort as the like gifts of corn out of the parsonage of Haddenham and Kingsey, two near adjoining towns to the said town or hamlet of Cuddington, at that day and time without mind in times past had been paid and performed to and amongst the poor people there; and that the corn due and belonging to the poor people of Cuddington had been unpaid by the space of thirty years last past; and the Commissioners thereby expressed their opinion that the said yearly allowance of corn was and ought still to be issuing and payable out of the parsonage of Cuddington as the like was payable out of the said parsonages of Haddenham and Kingsey, and that the said several gifts or allowances of corn had their beginning upon the several statutes, the one of 15 Ric. 2, c. 6, and the other of 4 Hen. 4, c. 12, whereby the said several parsonages being appropriated to the church were charged (as the Commissioners conceived) with the said allowance of corn to the poor of each town or parish, or otherwise had theretofore been given or assigned out of the several parsonages by some well-disposed person or persons, owner or owners thereof, to and for the relief of the poor there; and the Commissioners ordered that twelve bushels of corn should from thenceforth yearly be paid and allowed

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out of the parsonage of Cuddington by the owners, occupiers or farmers thereof; and an order was made for payment of the arrears by the farmers who had been in possession during the preceding thirty years.

*Vaughan Hawkins*, for the applicants. It is clear upon the evidence that this payment has long been made; and though its origin has for centuries been unknown, the inquisition and the order of the Commissioners made thereon in the time of James I. shew that the payment was issuing and payable out of the parsonage of Haddenham. By the operation of the award made in 1834 under the Inclosure Act of 1830, the charge which then existed upon the tithes was by virtue of ss. 37 and 66 of that Act shifted on to the lands which were allotted in lieu thereof. Down to the year 1898 there has been no default in payment since some time in the last century. Henry Bode took the lands expressly subject to this payment, and his mortgagees by the terms of their security also took the lands subject to all payments and outgoings, ecclesiastical or civil, charged upon or payable out of them. This litigation seems to have originated out of the case of *Lanchbury* v. *Bode* (1); but the decision in that case has nothing to do with this. The applicants are entitled to the declaration and order for which they ask by the summons.

*Ingle Joyce* and *R. J. Parker*, for the defendants. The applicants seek to enforce this payment, which they say was a rent-charge issuing out of the tithes, against us as the owners of these lands, which, for some purposes, have been, no doubt, substituted for the tithes. There may be a liability to make this payment in kind, but we say that the persons liable to make it are the Ecclesiastical Commissioners as the successors of the dean and chapter of Rochester, and not the owners of these lands. A rent-charge cannot be granted out of tithe, which is an incorporeal hereditament: Co. Litt. 47 a, 142 a, 144 a; Gilbert on Rents, p. 20; *Thomas* v. *Sylvester* (2); *Talentine* v. *Denton*. (3) No case is made out for the enforcement

(1) [1898] 2 Ch. 120. (2) (1873) L. R. 8 Q. B. 368.
(3) (1604) Cro. Jac. 111.

of this payment as against the land. The rectory or parsonage itself is charged, and not any specific part of the endowments. That view is confirmed by the order of the Commissioners upon the inquisition made in the time of James I. We rely upon the decision in *Lanchbury* v. *Bode*. (1) This payment never did nor could issue out of the tithe, and although the rector, clerical or lay, might be liable to pay it, it never attached to any particular part of the benefice, and there is nothing to attach the charge to the lands allotted in lieu of the tithes. If and so far as the payment constitutes a legal charge, it is a charge upon the endowments of the benefice. The liability to pay it rests upon the Ecclesiastical Commissioners, and it is payable out of the proceeds of sale of the lands which Bode purchased from them. In every case of this sort the claim is always against the parson: *Yielding* v. *Fay* (2); *Waples* v. *Basset*. (3) If there be any charge, it can only be in equity. The defendants have the legal estate subject to legal charges. Bode bought free from incumbrances, and of equitable charges neither Bode nor his mortgagees had notice. On the sale by the Ecclesiastical Commissioners to Bode, the ecclesiastical incidents were transferred to the proceeds of sale or the substituted property. The land sold ceased to be subject to those ecclesiastical incidents. The defendants are only owners of part of the allotted lands; the charge, if any, must be upon the whole of the lands.

*Vaughan Hawkins*, in reply. It is said that rent cannot issue out of an incorporeal hereditament. That is only partially true: *Attorney-General* v. *Emerson*. (4) It is plain that there was a charge of some kind upon the tithe and upon the whole rectory. In the case of a charge upon a manor, if part be alienated the charge follows the land. So in the case of glebe. There is no evidence that there was anything in the demise of the rectory except the tithes, and then the land took the place of the tithes. It cannot be that the charge is on the rectory as it exists for the time being, for that would get rid of such charges altogether. No doubt there is no power of distress,

(1) [1898] 2 Ch. 120.
(2) (1593) Cro. Eliz. 569.
(3) (1693) 4 Mod. 241; Skin. 399.
(4) [1891] A. C. 649, 659.

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and for that reason it is necessary to come into equity to enforce the payment. A similar charge was enforced in *Thorndike* v. *Allington*. (1) The decision in *Lanchbury* v. *Bode* (2) only affected the particular obligation there in question; it does not govern this case. The defendants are clearly liable. If there be any question of contribution, that can be determined hereafter: *Attorney-General* v. *Naylor* (3); *Attorney-General* v. *Wyburgh* (4); *Attorney-General* v. *Jackson*. (5)

*Cur. adv. vult.*

1900. Nov. 30. STIRLING L.J. (after stating the facts):—In this state of the evidence it appears to be established that the annual payment in question has long been made, and consequently it follows that every presumption in favour of it ought to be made by the Court. The order of the Commissioners to which I have just been referring shews that the origin of this payment was unknown nearly three centuries ago, and that order is based on the view therein expressed, that the payment was "issuing and payable out of the parsonage." The order, therefore, appears to me to shew that the payment constituted a charge on the "parsonage." By the parsonage is meant the endowments of the benefice. It is thus defined in Degge's Parson's Counsellor (ed. 1703), 190: "A parsonage, or rectory, is a certain portion of land, tythes and offerings, established by the laws of this kingdom, for the maintenance of the minister that hath the cure of souls within the parish where he is rector, or patron, and properly comprehends"—then follows a citation from Spelman's Glossary—"'integra ecclesia parochialis, cum omnibus suis juribus, prædiis, decimis, aliisque proventuum speciebus: alias vulgo dictum beneficium.'"

So far as the endowments of the benefice consisted of land, this payment might constitute a valid legal rent-charge issuing out of that land; but it is otherwise with regard to tithes, on

(1) (1666) 1 Cas. Ch. 79.
(2) [1898] 2 Ch. 120.
(3) (1863) 1 H. & M. 809.
(4) (1719) 1 P. Wms. 599.
(5) (1805) 11 Ves. 365.

which the charge would not be in strictness a legal rent-charge, as is shewn by the passages in Co. Litt., p. 47 a, and Gilbert on Rents, p. 21. I see no reason, however, why the payment should not constitute a valid charge in equity such as was upheld in *Thorndike* v. *Allington*. (1) This being so, I think that the payment constitutes a "charge or incumbrance" to which the tithes, along with the other endowments of the benefice, were subject, and consequently a "charge or incumbrance" to which the lands allotted in lieu of tithes became subject by virtue of s. 66 of the Inclosure Act of 11 Geo. 4. On the sale by the Ecclesiastical Commissioners, it seems to me that by the terms of the conveyance to Bode the land remained subject to this payment, as being a payment or outgoing charged upon or payable out of the hereditaments. The nature of such payments and outgoings is indicated by the express provision found in the deed as to the liability to repair the chancels of the parish churches. It was contended that the case was governed by the decision in *Lanchbury* v. *Bode* (2), which related to the same land. The payment which had to be considered in that case, however, was of a different kind, and Kekewich J. in dealing with it says that "when the question comes to be one of a charge on land there is quite a different question to be considered." (3) Moreover, in *Lanchbury* v. *Bode* (2), from the nature of the payment, the effect of s. 66 of the Inclosure Act had not to be considered.

It was also contended that, as the charge is declared by the Commissioners, under the Statute of Elizabeth, to be payable out of the "parsonage," it had now become transferred to the purchase-money in the hands of the Ecclesiastical Commissioners, or to the funds which represent that money. I am unable to see how that can be. In my opinion, the "parsonage" means the various properties which constitute the endowments of the benefice. Each and every of these properties was, in my opinion, charged with this payment, and it has not been shewn that the Ecclesiastical Commissioners had any power to sell free from such a charge. Further, it does

(1) 1 Cas. Ch. 79. (2) [1898] 2 Ch. 120.
(3) [1898] 2 Ch. 125.

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not appear to me that, even if they had power, they did so; for, as has already been pointed out, the conveyance to Bode was subject to this payment.

It was also said that the defendants were purchasers for value without notice. There is no evidence of this as regards the defendant Mrs. Bode; but the affidavit of the solicitor of Emma Robertson does state that he had no notice at the time the mortgage was taken. It was said that this was not strict evidence; but it is hardly likely that the defendant herself had notice where the solicitor had not. If an affidavit from her is insisted on, I shall give leave for one to be made; but it does not seem to me that the conveyance itself amounts to notice of the existence of any specific charge, except the liability to repairs of the chancels; and in my opinion the defence succeeds as against the mortgagee, subject to the production of this affidavit, though not as against the defendant Mrs. Bode.

Under these circumstances, the plaintiffs are entitled to a declaration that, as against the defendant Mrs. Bode, the lands in the summons are subject to the charge; but there must be an inquiry whether any and what part of the other property is chargeable therewith.

A further affidavit was filed by Emma Robertson denying notice; and upon the application of the plaintiffs, leave was given to cross-examine the solicitor of Emma Robertson upon his affidavit. In the course of his cross-examination the solicitor said that at the time of the carrying out of the mortgage he acted as solicitor to the mortgagees, and had no notice of the Alms Corn Charity. He communicated with Mr. Bode's solicitors. There were no requisitions; none were necessary. He simply took an abstract of the Ecclesiastical Commissioners' title—nothing more. That was quite good enough for him. He had correspondence with Mr. Bode's solicitors on the subject of the mortgage. They delivered an abstract of title, and subsequently the copy draft conveyance from the Ecclesiastical Commissioners. No requisitions were made on the abstract. The mortgage was prepared from the abstract and the copy draft conveyance. No requisitions were made on the words

"subject to all payments, &c., charged on the property." He made no specific inquiry as to payments charged on the property.

The summons subsequently came on again before Stirling L.J. for further argument upon the question whether the defendant mortgagee was affected with notice of the charge.

*Vaughan Hawkins*, for the plaintiffs, relied upon *Jones* v. *Williams* (1), and contended that the mortgagee was put upon inquiry as to the existence of charges upon the property, and must be deemed to have had notice of the charge in question.

*R. J. Parker*, for the mortgagee, argued that she had had no notice of the charge, and that under the circumstances no inquiry was reasonably necessary to be made by the solicitor on her behalf. [He cited *In re Ford and Hill.* (2)]

1901. July 31. STIRLING L.J. (after stating the facts). The question which I have now to decide is whether the mortgagee is to be taken to have had notice that there was a charge on the land, leading her to make proper inquiries as to its character from the mortgagor. In my opinion she is. The word "purchaser" in s. 1 of the Conveyancing Act, 1882, includes "a lessee, or mortgagee, or other person, who, for valuable consideration, takes or deals for property." Consequently, Miss Robertson is a purchaser within the meaning of that term used in the Act. On her behalf it was argued that s. 3, sub-s. 1, applied. That section enacts that a purchaser shall not be prejudicially affected by notice of any instrument, fact or thing, unless, (ii.) in the transaction in which a question of notice to the purchaser arises, "it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent." I have to ask myself two questions. First, ought inquiry to have been reasonably made in respect of the charge by the mortgagee? And I answer that question in the affirmative. Then I have

(1) (1857) 24 Beav. 47. (2) (1879) 10 Ch. D. 365.

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to ask myself whether, if such inquiry had been made, it would have come to the knowledge of the mortgagee that the charge in fact existed. The answer to that is also Yes. No doubt if a reasonable, though misleading, reply be given to a requisition the purchaser is not bound to assume it is not correct and to push his inquiry further. But here it is reasonable to assume, if the question had been asked, a true reply would have been given. In the present case I think the solicitor for Miss Robertson should have treated the conveyance of November 17, 1881, as notice of the existence of "payments and outgoings ecclesiastical and civil" charged on the property conveyed. The decisions in *Jones* v. *Williams* (1) and in *Jones* v. *Smith* (2), cited in that case, appear to me to govern the present case. In the former case there was a conveyance of property "subject to all mortgages and charges affecting the same"; a mortgagee of the property knew of the existence of two charges, and made no inquiry whether there were any others: there was in fact a third, and it was held that he could not claim to be a purchaser without notice of other charges, because he believed that the two which satisfied the word "charges" were all the charges that existed on the property. He was bound to inquire whether there were any others. Lord Romilly M.R., in the course of his judgment in that case, said (3): "With respect to the argument, that it was unnecessary to make any inquiry because it would have led to no result, I think it impossible to admit the validity of this excuse. I concur in the doctrine of *Jones* v. *Smith* (2) that a false answer, or a reasonable answer given to an inquiry made, may dispense with the necessity of further inquiry, but I think it impossible, beforehand, to come to the conclusion, that a false answer would have been given, which would have precluded the necessity of further inquiry. A more dangerous doctrine could not be laid down, nor one involving a more unsatisfactory inquiry, viz,, a hypothetical inquiry as to what A. would have said if B. had said something other than what he did say." In the doctrine there laid down I fully

(1) 24 Beav. 47.

(2) (1841) 1 Hare, 43, 55.

(3) 24 Beav. 62.

concur; and the conclusion I come to in this case is that the charge has been made out, and that the defendant mortgagee takes subject to it. There must be a declaration that the mortgaged property has been taken subject to the charge, and the costs will be added to the security.

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Solicitors: *The Treasury Solicitor; Peake, Bird, Collins & Co.*

G. A. S.

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## KELLY'S DIRECTORIES, LIMITED *v.* GAVIN AND LLOYDS.

BYRNE J.
1901
*July* 23.

[1900 K. 502.]

*Practice—Costs—Taxation—Co-defendants—Judgment against One Defendant—Liability of One Defendant for all Plaintiffs' Costs.*

In an action against two defendants to restrain an infringement of copyright, the plaintiffs obtained an injunction with costs against one defendant, G., but failed to obtain any order against the other defendant, to whom, however, no costs were given. By the order as drawn up the defendant G. was directed to pay to the plaintiffs "their costs of this action": the taxing master allowed the plaintiffs all the costs of the action, including those incurred against the second defendant: the defendant G. objected that in this way he was unfairly made to pay the costs of the plaintiffs' unsuccessful attempt to fix his co-defendant with liability. The taxing master overruled this objection, on the ground that the order did not direct him to make any deduction on account of the joinder of the second defendant.

On a summons to review:—

*Held*, that the order was clear, that the taxing master's view was correct, and that the defendant G. must pay all the plaintiffs' costs of the action.

ADJOURNED SUMMONS.

This was an application by the defendant Gavin to review the taxation of the plaintiffs' bill of costs in this action, under the following circumstances.

The action was brought to restrain the defendants, Gavin and Lloyds, from printing, publishing, and selling a book called "Lloyds' Diary for Merchants, Shippers, and Foreign Buyers for 1900," which was alleged to be, in parts, an infringement and piracy of "Kelly's Directory of Merchants, Manufacturers,

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and Shippers," and for an account of profits. The defendant Gavin put in a defence, but did not appear at the trial, which took place in January last, when the Court was satisfied that there had been an infringement of the plaintiffs' copyright by him, and granted an injunction as against him with costs; the Court also found that the defendant Lloyds had not made themselves liable as the actual printers of the infringing book, and refused to grant an injunction against them, but gave them no costs. (See report of this case. (1))

The order, as drawn up against the defendant Gavin, on the question of costs, was as follows: That the defendant Gavin do pay to the plaintiffs "their costs of this action up to and including this judgment, to be taxed by the taxing master." The defendant Gavin attended, or was represented, at the drawing up of this order.

Under this order the plaintiffs brought in for taxation their bill of costs in the action, as against the defendant Gavin, and included therein all their costs as against the defendant Lloyds, and the taxing master taxed this bill and allowed the plaintiffs all their costs. The defendant Gavin thereupon delivered objections to this taxation on the following grounds: "(1.) Because the items objected to are costs incurred by the plaintiffs in this action in endeavouring to prove their case against the defendant Lloyds, in which they were unsuccessful, and are not costs affecting the defendant Gavin. The judge in delivering judgment refused to allow the plaintiffs any costs against the defendant Lloyds, but merely an injunction against the defendant Gavin with costs, and the costs objected to, as taxed, are not payable by the defendant Gavin to the plaintiffs. (2.) Because the items marked with red ink are in excess of what the defendant Gavin should pay under the general objection raised herein." The taxing master's reason for disallowing these objections was as follows: "The defendant Gavin is ordered to pay to the plaintiffs their costs of this action up to and including the judgment to be taxed. I have taxed the plaintiffs' costs of action: I am not directed to make any deduction therefrom on account of the defendant Lloyds being

(1) [1901] 1 Ch. 374, 382.

joined, and I have made none. Holding this view, I have overruled the objection, which is one of principle only, and not affecting any item of allowance if my view of the order is right."

The defendant thereupon took out the present summons, asking that his objections might be allowed, and that the matter might be referred back to the taxing master to vary his certificate accordingly.

*Bradford*, for the defendant Gavin. The judgment expressly refused to give the plaintiffs any costs against the defendant Lloyds, but if the taxing master's construction of the order is correct, the plaintiffs will nevertheless get all their costs against Lloyds from the defendant Gavin— that cannot be right: the defendant Gavin is now unfairly saddled with the extra costs occasioned by the unsuccessful attempt to fix Lloyds with liability for pirating the plaintiffs' book. The defendant Gavin is clearly not liable for costs solely attributable to the unsuccessful attack on his co-defendant Lloyds. There is no direct authority upon this point.

*E. Ford*, for the plaintiffs. The taxing master's interpretation of the order, as drawn, is correct; the order contains no directions to him to distinguish costs occasioned by the claim against Lloyds. Though there is no reported case exactly in point, it is clear that there can be no contribution between co-defendants—each defendant is liable for the whole of the costs of that action: *Dearsley* v. *Middleweek* (1); *Real and Personal Advance Co.* v. *McCarthy* (2); both defendants are jointly and severally liable for all the costs of the action: *Stumm* v. *Dixon & Co.* (3); it was the defendant Gavin's fraud that caused the action. The Court might have directed a distinction to be made as to some of the costs, but as it has not done so in the present case, the taxing master had simply to tax the plaintiffs' "costs of this action," and this he has correctly done.

*Bradford*, in reply.

(1) (1881) 18 Ch. D. 236. (2) (1881) 18 Ch. D. 362, 368.
(3) (1889) 22 Q. B. D. 529.

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BYRNE J. When this action was tried, it was proved that the defendant Gavin had been guilty of what the Court considered was a gross fraud in pirating a portion of the plaintiffs' book, and an injunction was accordingly granted against him with costs; the question against the other defendant, Lloyds, was whether they were liable as partners or agents of their co-defendant Gavin, there having been an arrangement under which they were to print the book containing some pirated material, but for which pirated material the defendant Lloyds were not proved to have been responsible, nor were they held responsible for the actual printing; under these circumstances no relief was granted against the defendant Lloyds, the plaintiffs were not given any costs against them, and were not ordered to pay any costs. An order embodying the result of this judgment was drawn up, and it is on the construction of this order that my decision is now asked. I am told that the defendant Gavin attended, or was represented, at the drawing up of this order, which, so far as material for present purposes, directs the defendant Gavin to pay to the plaintiffs "their costs of this action" up to and including the judgment. The taxing master has taxed, and allowed, against the defendant Gavin, the whole of the plaintiffs' costs of the action. Objection is taken that some of these costs were incurred by reason of the case set up against the defendant Lloyds which, as a fact, did not prove successful, and it is said that the taxing master ought to have made some distinction in his taxation, so as not to visit upon the defendant Gavin the extra costs occasioned by the unsuccessful claim made against his co-defendant. I have not now to consider what form of order I should have made if the matter were now raised before me for the first time, as at the trial: the order has been drawn up, passed, and entered, and I am bound by it as it now stands. As was pointed out by Lord Esher in *Stumm* v. *Dixon & Co.* (1), "In cases in the Chancery Division the judges mould their judgments as to costs so as to meet the circumstances of each particular case," and there are well-known forms of orders in which a distinction as to particular costs is directed

(1) 22 Q. B. D. 532.

to be made, and I was referred by the registrar during the argument to a case which my learned brother Joyce had before him last sittings, where the circumstances were somewhat similar to the present (that is to say, success against one defendant and not against the other), and a discussion arose in Court as to the exact form of the order, and the learned judge directed the order when drawn up to contain the following words as to costs: "except so far as they," the costs, "were occasioned by the claim against the second defendant." In that order there is a distinction as to costs quite familiar to all of us in other forms of order, where one defendant's costs are directed to be paid by the plaintiff, who is to have them back again from another defendant. In the present case I have an order clearly directing the defendant Gavin to pay the plaintiffs their costs of this action, and I cannot mould or reframe that order now; the proper time to ask for the insertion of some words distinguishing these extra costs, or to object to the form of the proposed order, was at the trial, or later, at the actual drawing up of the order, when the defendant, as I understand, attended; it is too late for any alteration now. In my opinion the taxing master has taken a correct view of what this order means, and I cannot interfere, and I therefore dismiss this summons with costs.

Solicitors: *T. C. Russel; Scott, Spalding & Bell.*

W. C. D.

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*Aug.* 2, 8.

# KING'S COLLEGE, CAMBRIDGE *v.* UXBRIDGE RURAL DISTRICT COUNCIL.

[1901 K. 598.]

*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 15, 16, 27—*Sewer—Power to carry through or under Street or Lands—Pumping-station—Compensation or Purchase—Disposal of Sewage.*

An engine-house with pump and machinery, erected partly above and partly below the level of the ground, for lifting and forcing along a rising main the sewage of a district to a common outfall for treatment, is not a "sewer" within the meaning of s. 16 of the Public Health Act, 1875, which a local authority is thereby empowered to carry through or under any street, or any land within its district on making compensation to the owner, but is a work for the purpose of "receiving or otherwise disposing of sewage" within s. 27, for which the necessary land must be purchased or leased.

MOTION.

This was an application by the plaintiffs, the Provost and Scholars of King's College, Cambridge, as lords of the manor of Ruislip, and one R. H. Deane, an adjoining owner, for an interim injunction to restrain the defendants, the Uxbridge Rural District Council, from proceeding with the construction of a pumping-station in course of erection by them upon a certain strip of uninclosed or waste land in the parish of Ruislip, on the north side of the high road from Uxbridge to London, and alleged to belong to the plaintiffs or one of them, and from otherwise trespassing on the said strip of land. The question for decision was whether this pumping-station was a "sewer" within the meaning of the Public Health Act, 1875, which, under s. 16, the local authority were empowered to carry under a turnpike road or street, or, after notice, into or under any lands within their district. The facts, so far as material, were as follows :—

The defendant council had recently determined to carry out a new scheme for the disposal of the sewage of the parish of Ruislip (which included the town of Northwood, the hamlet of Eastcote, and the village of Ruislip) by which the sewage

of the whole parish was to be conveyed to one common outfall for treatment; owing to the levels, the sewage of Eastcote could not be conveyed to the outfall site entirely by gravitation, and it was therefore necessary to lift it, and pump it along a rising main from Eastcote village to Ruislip village, and for this purpose a pumping-station, somewhere near the spot in question, was necessary. The defendant council, without giving any notice to the plaintiffs, had entered upon the strip of land in question and were proceeding to erect a pumping-station upon it, alleging that it was roadside waste and formed part of the highway. The plaintiffs also claimed to be owners of this strip of land, and as they considered that the proposed erection was calculated seriously to damage the adjoining land, which was now coming into the market for building purposes, and that the effect of the proposed building would be otherwise very detrimental to their property, the present action was commenced with a view to stopping the defendant council from going on with the work; the plaintiffs now moved for an interim injunction.

The pumping-station, which was in an advanced state of construction, was a low one-storied building to contain the engine and pump, and was erected partly above and partly below the level of the ground, and, according to the contention of the defendant council, was not intended or adapted to be used for "receiving, storing, disinfecting, distributing, or otherwise disposing of" the sewage within the provisions of s. 27 of the Public Health Act, 1875, but was essentially a part of the sewage system of the district, which they were entitled to carry through or under the highway or any lands within their district, and that without some means of this kind it was impossible for the present system of sewerage to deliver the Eastcote sewage on to the outfall site. Materials for road-making had occasionally been deposited on this strip of land by the local authority.

*Norton, K.C.*, and *R. J. Parker*, for the plaintiffs. The spot where this pumping-station is being erected forms no part of the highway; roadside waste of this kind does not vest in the

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local authority: *Curtis* v. *Kesteven County Council* (1); the fact that road-making material or road scrapings have been deposited on this strip of land does not prove dedication as part of the highway: *Countess of Belmore* v. *Kent County Council*. (2) This strip of land belongs to one or other of the plaintiffs—for the purposes of this action it does not matter which, as both claim relief; if it is waste, it belongs to King's College as lords of the manor; if it is land adjoining inclosures near a highway, it belongs to the other plaintiff as adjoining owner. The defendant council has not given any notice under s. 16 to the plaintiffs, as owners, of their desire to work under our land. Even if this strip were part of the highway, a pumping-station of this kind is not a "sewer" within the meaning of ss. 4 and 15 of the Public Health Act, which, by s. 16, can be carried under the highway, or, with notice, under any lands within the district. A local authority has under this section power to carry a sewer partly under and partly above ground: *Roderick* v. *Aston Local Board* (3); and also to construct side entrances to man-holes as part of a sewer: *Swanston* v. *Twickenham Local Board* (4); but no case has gone so far as to decide that a building of this kind is "a sewer," or part of a sewer. The proposed erection is really a means of "disposing of" the sewage within s. 27 of the Public Health Act; and if the land is required for this purpose it must be purchased. Therefore, this erection is not a sewer at all within s. 16; and even if it were it is on our private land, and no notice has been given. For these reasons the plaintiffs are entitled to an injunction.

*Levett*, *K.C.*, and *Lushington*, for the defendant council. The plaintiffs have not proved that they, or one of them, are the owners of this strip of land; and assuming the strip of land in question to be part of the highway, this pumping apparatus is just as much a part of the sewer as the man-holes were in *Swanston* v. *Twickenham Local Board*. (4) It is clearly not necessary that the whole of a sewer should be underground: *Roderick* v. *Aston Local Board*. (3) The defini-

(1) (1890) 45 Ch. D. 504.
(2) [1901] 1 Ch. 873.
(3) (1877) 5 Ch. D. 328.
(4) (1879) 11 Ch. D. 838.

tion of "sewer" in s. 4 of the Act is not an exhaustive one, as appears from *Poplar Board of Works* v. *Knight*. (1) This pumping arrangement is a necessary adjunct to the sewer, and forms part of the sewage system; we are, therefore, within s. 16. Assuming that this strip is not part of the highway, still, if we are within s. 16, it is only a question of giving notice, and the Court will not grant an interim injunction when everything is regular and in order except a mere formal notice: *Hutchings* v. *Seaford Urban Council*. (2)

This particular pumping-station is not a means for the "disposal of sewage" within s. 27. Sect. 27 and subsequent sections provide the powers necessary to enable a local authority to store, disinfect, and dispose of its sewage; the apparatus in question is not a means of disposing of the sewage in this sense: it is simply a means of forcing the sewage up a rising main at this particular spot, to enable the defendant council to run it off to another outfall, where it will be disposed of and treated.

BYRNE J., after stating the nature and object of the action, and coming to the conclusion on the evidence that the strip of land in question belonged either to the lords of the manor or the adjoining owner—it did not matter which, as both were plaintiffs—and that consequently the defendant council had no right to go on to this strip of land without reasonable notice in writing to the owners for the purpose of executing this work, continued:—I have heard a considerable argument upon the question whether the proposed work comes within s. 16 or s. 27 of the Public Health Act, 1875. Sect. 16 provides: "Any local authority may carry any sewer through across or under any turnpike road, or any street or place laid out as or intended for a street, or under any cellar or vault which may be under the pavement or carriageway of any street, and, after giving reasonable notice in writing to the owner or occupier (if on the report of the surveyor it appears necessary), into through or under any lands whatsoever within their district. They may also (subject to the provisions of this Act relating to

(1) (1858) E. B. & E. 408. (2) (1898) 43 Sol. J. 41.

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sewage works without the district of the local authority) exercise all or any of the powers given by this section without their district for the purpose of outfall or distribution of sewage." The question I have to consider is whether the proposed work is in itself a "sewer" within this s. 16, or does it come within s. 27, where it is provided that, "For the purpose of receiving storing disinfecting distributing or otherwise disposing of sewage, any local authority may (1.) construct any works within their district, or (subject to the provisions of this Act as to sewage works without the district of the local authority) without their district; and (2.) contract for the use of purchase or take on lease any land buildings engines materials or apparatus either within or without their district"; and the section concludes: "Provided that no nuisance be created in the exercise of any of the powers given by this section." I have heard an argument on the construction of s. 27 to the effect that this proposed work cannot be considered to be for the purpose of "receiving, storing, disinfecting, distributing, or otherwise disposing of sewage" within the meaning of the section; but it appears to me that if provision is made outside the structure of what is ordinarily known as a sewer or drain for the purpose of taking up the sewage matter which is conveyed down to this place to another portion of the sewer, that is "receiving" the sewage, and, even if that be too wide a construction, the words "otherwise disposing of sewage" are ample to cover a work of this kind, because the pumping-station is for the purpose of forcing the sewage from one place to another. What for? For disposing of it, and for no other purpose. Therefore, I think that the words of s. 27 do apply to the case of a work like the present, and I do not think that the words in s. 16 about carrying a sewer through, across, or under any turnpike road, and so on, are meant to apply to large independent outside structures and works like those referred to in the present case. It is quite true that a man-hole—a very large man-hole, and a man-hole meant to afford a side access to a sewer thirty feet deep, with a great deal of brickwork underground, and covered over by an iron trap—has been held under the Public Health Act, 1848,

in *Swanston* v. *Twickenham Local Board* (1), to be part of the "sewer"; and I am not at all prepared to say, if the present work had been confined altogether to a method of access to the sewer underground, it might not also come within the principle of that decision upon the construction of this s. 16, and so be held to be part of a sewer; but that is not the condition of things here, and I do think it would be a great stretch of imagination to hold that a large independent building, outside and over the surface, or partly over the surface and partly underneath, meant to be used as an engine-house and works, was part of a sewer. For these reasons I come to the conclusion that what is being done is being done unlawfully, and that the plaintiffs have made out a case for an interim injunction to restrain the defendant council from entering upon or taking this land otherwise than strictly in accordance with their statutory powers, not being powers under s. 16.

Solicitors: *Withers & Withers; Woodbridge & Sons.*

W. C. D.

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## PHILLIPS *v.* HOWELL.



[1900 P. 1863.]

*Vendor and Purchaser—Specific Performance—Costs—Equitable Set-off—Debts "en autre Droit."*

The plaintiff, as purchaser of leasehold property, obtained judgment for specific performance against the defendant, as administratrix of an intestate, with costs to be paid by her personally. The defendant had a beneficial interest, to the extent of one-fourth, in the intestate's estate, and it was alleged that except a mortgage there were no unpaid debts of the intestate, and that the purchase-money payable by the plaintiff represented the whole of the intestate's estate. The judgment not having been passed and entered, the plaintiff moved for the addition of a direction enabling him to deduct the costs due to him from the defendant from so much of the purchase-money as represented her beneficial interest in the intestate's estate:—

*Held*, that without some form of administration order, which the Court had no power to make in this action, it was impossible to ascertain what the

(1) 11 Ch. D. 838.

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amount representing the beneficial interest of the defendant was, so as to bind other persons interested in the intestate's estate; and, distinguishing *Green* v. *Sevin*, (1879) 13 Ch. D. 589, that, though a set-off of costs against purchase-money might be allowed in a case where the debt due to and the debt due from the vendor were so due in the same capacity, the plaintiff here could not be allowed to bring into account all or any part of an unascertained sum to which the defendant might be beneficially entitled in the administration of her intestate's estate, as against the purchase-money which was due to her in her representative capacity.

MOTION.

The only question raised on this application which calls for any report was whether a plaintiff in a specific performance action was entitled to set off costs due to him from the defendant vendor against the defendant's beneficial interest in a portion of the purchase-money, the whole of which was payable to the vendor in a representative capacity. The facts, so far as material, and as found by the Court, were as follows:—

The plaintiff brought an action for specific performance of an agreement of May 24, 1900, entered into by the defendant with the plaintiff, for the sale of a leasehold public-house, to which the defendant could only make a title as administratrix of the personal estate of one Mary Jones, deceased; but in which she also had a beneficial interest as one of the next of kin of Mary Jones, and as assignee of another of the next of kin, to the extent in all of one-fourth of the intestate Mary Jones' estate. The defendant resisted specific performance, and put in a counter-claim seeking to set aside the contract on the ground of fraud, undue influence, and surprise; the plaintiff, however, succeeded in his action, and on July 6, 1901, obtained judgment for specific performance of the said agreement of May, 1900, with costs, the counter-claim also being dismissed with costs. When judgment was pronounced, counsel for the plaintiff made some application as to setting off, or deducting, the costs the plaintiff was entitled to from the purchase-money; but, on its being pointed out by the judge that there was a difficulty in making an order of that kind, the application was not further pressed. Some little delay occurred in drawing up the order, during which the plaintiff ascertained that the defendant had, after action, purported to charge her

beneficial interest in the property, the subject of the contract for sale, in favour of her solicitors; and he thereupon served a notice of motion on the defendant of his intention to apply for an addition to the judgment, which had not been passed and entered, which would enable him to set off the costs due to him from the defendant against so much of the purchase-money payable by him to her as represented her beneficial interest in the intestate's estate. It was alleged to have been proved in the course of the trial, that except a mortgage for 500*l.*, there were no unpaid debts of the intestate, and that the purchase-money payable by the plaintiff under the contract for sale now represented the whole of the intestate's estate. The addition proposed by the plaintiff, and set out in his notice of motion, was as follows: "And it appearing that all the debts (other than the moneys due upon the security hereinafter mentioned) of Mary Jones, deceased, in the pleadings mentioned have been paid, and that the defendant is beneficially entitled to one-fourth part of the residue which will remain of the purchase-moneys, 1300*l.*, payable under the agreement of May 24, 1900, after payment thereout of all moneys due upon the security of a mortgage dated the 26th day of October, 1892, of the property comprised in the said agreement . . . . Let the plaintiff be at liberty to deduct his taxed costs of this action and of the counter-claim from the one-fourth part of the said residuary purchase-moneys, of which the defendant is beneficially entitled as aforesaid, or (as the case may be) to retain the said one-fourth part in satisfaction pro tanto of the said costs."

*Rowden, K.C.*, and *Hon. Frank Russell*, for the motion. A successful plaintiff is allowed to deduct his costs from the purchase-money he has to pay to the defendant vendor notwithstanding, and in priority to, a charge created subsequently to the date of the agreement for sale: *Green* v. *Sevin* (1); Seton on Decrees, 4th ed. p. 1304, and 5th ed. p. 1861, where *Green* v. *Sevin* (1) is cited as the authority for the form of order given. This is not so much a question of set-off of costs

(1) 13 Ch. D. 589, 602.

BYRNE J. 1901 PHILLIPS v. HOWELL.

against purchase-money as a claim to deduct from a part of the purchase-money the costs due to the purchaser from the defendant: it is the right of a successful purchaser to say to the vendor, "You shall not receive any part of the purchase-money for your own benefit until you have paid me the costs occasioned by disputing my claim to specific performance." The fact that three-fourths of the purchase-money are payable to the defendant in a representative capacity does not deprive the purchaser of this right against the remaining one-fourth which belongs to the vendor beneficially. The existence of the charge given by the defendant on her interest was unknown at the time when judgment was pronounced, or the question of set-off would not have been dropped.

*Levett, K.C.*, and *T. L. Wilkinson*, for the defendant. The purchase-money is due to the defendant in her representative capacity as administratrix; the debt for costs is due from her personally. In order to be entitled to set-off, the debts must be due to and due from a person in the same capacity: *Bishop* v. *Church* (1), where set-off was refused because the debts were due in different rights. There can be no set-off in autre droit: *Medlicot* v. *Bowes*. (2) True the defendant claims to be entitled to one-fourth, but the exact amount cannot be ascertained without taking an account; and for the mere purposes of set-off the Court will not take an account: *Middleton* v. *Pollock*. (3) The exact amount of the defendant's interest in this purchase-money cannot be ascertained without administration of the estate of Mary Jones, and this cannot be done in an action for specific performance. The plaintiff is not entitled to the addition asked for by this motion.

*Rowden, K.C.*, in reply. According to the defendant's own evidence, one-fourth of the purchase-money belongs to her absolutely, and the only relief asked for is a charge on, or deduction from, the beneficial interest of the defendant, whatever it may be, in this purchase-money: it is not necessary to shew a clear legal right to set-off to obtain some equitable relief. The plaintiff had something in the nature of an

(1) (1748) 3 Atk. 691. (2) (1748) 1 Ves. Sen. 207.
(3) (1875) L. R. 20 Eq. 29, 34.

inchoate charge for costs on this purchase-money analogous to the inchoate lien a vendor has on the property sold for his costs, if necessary, against the purchaser. It is equitable relief which is asked—an equitable charge on the defendant's beneficial interest, to secure costs due from her to the plaintiff. [*Graham* v. *Drummond* (1) was mentioned.]

*Cur. adv. vult.*

Oct. 29. BYRNE J., after shortly stating the facts as above, continued:—It is conceded that the plaintiff could not ask to retain his costs out of the purchase-money generally, that being payable to the defendant in her capacity of administratrix, and the costs being due from her personally; but it is said that, the defendant having proved in the course of the case that one-fourth of the purchase-money belongs to her absolutely, subject to the payment off of a mortgage and to a charge created by her subsequently to the contract, the plaintiff is entitled to have provision made for the application of what would otherwise have been payable in the administration of her intestate's estate in respect of her beneficial interest, or so much thereof as is necessary in or towards satisfaction of the costs ordered to be paid by her. In answer to this, I may first of all point out that, without some form of administration order, which I have no power to make in this action, it would be impossible to ascertain what the amount representing the beneficial interest of the defendant is, so as to bind other persons interested in the intestate's estate.

No authority was produced for an order similar to that now asked for by the plaintiff, but *Green* v. *Sevin* (2) was relied on as justifying the present application. In that case a successful purchaser plaintiff was allowed to deduct the costs of action and counter-claim from the purchase-money, notwithstanding a charge created on the property agreed to be sold subsequently to the date of the contract.

In my judgment that case is no authority for the order now asked. It does seem to be an authority for the proposition

(1) [1896] 1 Ch. 968. (2) 13 Ch. D. 589.

BYRNE J. 1901 PHILLIPS v. HOWELL.

that where judgment for specific performance is granted in favour of a purchaser there is jurisdiction to direct that, in adjusting the accounts as between vendor and purchaser, the purchaser is entitled to bring into the account the amount of the costs which the vendor has been ordered to pay against the purchase-money. That is, in a case where the debt due to, and the debt due from, the defendant, are so due to and from the defendant in the same capacity. I do not think, however, that this jurisdiction extends to allowing the plaintiff to bring into account all or any part of an unascertained sum to which the defendant may be beneficially entitled in the administration of her intestate's estate as against the purchase-money which is due to the defendant in her representative capacity. I think that, if any right is to be established against the beneficial share of the defendant in the estate, it must be by due process of execution, the two debts, the costs and the purchase-money, not being capable of being set off or brought into account against one another.

It appears to me that the motion is misconceived, and must be dismissed with costs, which may be set off against the costs already ordered to be paid by the defendant.

Solicitors: *Beaumont, Son & Rigden, for W. C. Phillips, Newport, Mon.; C. A. Elgood, for Gardner & Herbert, Newport, Mon.*

W. C. D.

## *In re* VAN STRAUBENZEE. BOUSTEAD *v.* COOPER.

[1901 V. 221.]

COZENS-HARDY J.

1901

*July* 19, 26; *Aug.* 6.

*Settlement—Reversionary Interest—Conversion for Benefit of Persons entitled in Succession—Covenant to Settle After-acquired Property.*

The rule in *Howe* v. *Earl of Dartmouth*, (1802) 7 Ves. 137; 6 R. R. 96, does not apply in the case of a settlement by deed, and apparently only applies where there is a disposition by will of residuary personal estate given as one fund to be enjoyed by several persons in succession.

By a settlement dated November 13, 1841, and made between General John Luther Richardson of the first part, Miss Charlotte Louisa Richardson of the second part, General Sir Charles Thomas Van Straubenzee (then Captain Van Straubenzee) of the third part, and certain trustees of the fourth part (on the marriage of Miss Richardson and Captain Van Straubenzee), a sum of 2000*l.* East India stock, the property of General Richardson, was settled upon trust for the wife for life, and then for the husband for life, with usual trusts for the issue of the marriage; and in the event, which happened, of there not being any child of the marriage, then the trustees were to transfer one moiety to the husband, his executors, administrators, and assigns absolutely, and to transfer the other moiety to General Richardson, his executors, administrators, and assigns. The settlement contained a covenant by the husband and wife that in case at any time or times thereafter during the coverture any real or personal estate or effects of any kind or quality of estate and effects should come to or vest in the wife, or the husband in his right, at law or in equity, by devise, descent, gift, or otherwise, the same should be conveyed, settled, and assured from time to time, without any delay by the husband, his executors and administrators, and the wife, and all persons claiming under her, with the trustees, their heirs, executors, administrators, and assigns respectively, according to the nature or quality of the said property respectively, upon such and the same trusts, and to and for such and the same ends, intents, and purposes,

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and with, under, and subject to such and the same powers, provisions, and limitations, declarations, and agreements, as were thereinbefore mentioned, expressed, and declared of and concerning the said sum of 2000*l.* East India stock, or as near thereto as the nature of the property or other intervening circumstances should permit. The settlement did not contain any power to vary securities.

General Richardson by his will, dated April 13, 1847, and proved in 1849, gave all his residuary personal estate to trustees, upon trust as soon as conveniently might be to sell and convert into money all such parts of his estates and effects as should not consist of money, and to stand possessed of the moneys which should arise from the said sale of his said residuary estate and effects, as to one equal third part in trust for his daughter Mrs. Ellis, for her separate use; as to another equal third part for Lady Van Straubenzee absolutely; and as to the remaining third part in trust for his daughter Catherine Frances Richardson absolutely.

Lady Van Straubenzee died in 1900, a widow and without issue.

An originating summons was taken out by John Boustead, William Naughtin, and Lindsay Farrington, the then trustees of the settlement of 1841, to which summons the following persons were defendants, namely, J. H. Cooper and D. Hale, the legal personal representatives of the surviving trustee of the settlement; J. F. Rochford, the legal personal representative of Lady Van Straubenzee; Frances G. M. Naughtin (wife of W. Naughtin) and T. Van Straubenzee and J. P. Jervoise, who with the plaintiff Farrington were the legal personal representatives of General Van Straubenzee; and A. J. King, the legal personal representative of General Richardson.

As regards one of the questions raised by the summons, Cozens-Hardy J. held that the one-third share which Lady Straubenzee took in her father's residuary estate was bound by the covenant to settle after-acquired property. This residue included one moiety of the settled property, which, on her death, a widow and without issue, fell to General Richardson's executors.

A further question was then argued, namely, whether the rule in *Howe* v. *Earl of Dartmouth* (1) applied.

*J. T. Prior*, for the trustees of the settlement, stated the facts.

*Vernon Smith, K.C.*, and *Wrangham*, for the legal personal representatives of General Van Straubenzee. It is contended on behalf of Lady Van Straubenzee's representative that the rule in *Howe* v. *Earl of Dartmouth* (1) applies, and that as the residue of General Richardson's estate included a moiety of the settled property—a reversionary interest which only fell into possession on Lady Van Straubenzee's death—the whole of that ought not to be deemed capital, but that there ought to be apportionment as between capital and income in accordance with *In re Earl of Chesterfield's Trusts*. (2) But *Howe* v. *Earl of Dartmouth* (1) does not apply to the case of a settlement; it only applies to wills. The only authority to the contrary is a passage in Vaizey on Settlements, p. 421 [cited in the judgment, p. 782, below]. But there is no reported case to that effect, and *Milford* v. *Peile* (3) is in our favour.

*Ashton Cross*, for the defendants Cooper and Hale.

*Eve, K.C.*, and the *Hon. Frank Russell*, for Lady Van Straubenzee's legal personal representative. The rule in *Howe* v. *Earl of Dartmouth* (1) does apply, and the reversionary interest must be treated as having been converted so as to give the tenant for life the income of the fund. The interest ought to have been realized, and the Court will treat it as if this had been done. *Milford* v. *Peile* (3) turned on the particular words of the document in that case. The principle of *Howe* v. *Earl of Dartmouth* (1) is that where there is either a non-productive or a wasting property the Court will deal fairly as between the tenant for life and the remainderman, so as to give each the benefit of the property; and there is no reason for not applying that principle to the case of a settlement.

[They also referred to *Rowlls* v. *Bebb*. (4)]

*George Cave*, for the defendant King.

*Cur. adv. vult.*

(1) 7 Ves. 137; 6 R. R. 96.
(2) (1883) 24 Ch. D. 643.
(3) (1854) 17 Beav. 602.
(4) [1900] 2 Ch. 107.

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Aug. 6. COZENS-HARDY J., after stating the facts as above set out, continued as follows:—Now, so far as I am aware, the rule in *Howe* v. *Earl of Dartmouth* (1) has never been applied except to a disposition by will of residuary personal estate given as one fund to be enjoyed by several persons in succession. The Court assumes an intention that the legatees should enjoy the same thing in succession, and, as the only mode of giving effect to such intention, it directs the conversion into permanent authorized investments of all such parts of the residuary estate as are of a wasting or reversionary or unauthorized character: see *Pickering* v. *Pickering* (2) and *Macdonald* v. *Irvine*. (3) But the rule does not apply to any bequest which is specific, as distinguished from residuary. On principle, I can see no ground for applying the rule to the present case. The covenant to settle after-acquired property is a contract which has to be performed in strict accordance with its terms. It operates upon that which must be regarded as a specific property—namely, the lady's share in her father's estate. This share is to be vested in the trustees upon the same trusts as are declared with reference to the India stock. Those trusts do not include a trust for sale of the India stock, nor is there even a power to sell it, apart from legislation since 1841. I cannot imply a trust to convert that which is brought into the settlement, whether it be real estate or personal estate. It is remarkable that there is no direct authority on the point. Mr. Vaizey, in his book on Settlements, p. 421, says: "There are two cases in which, probably, the rule is applicable to trusts in settlements created by deed. One is that in which the unrealized estate of a deceased person, or of the share in such an estate to which the settlor is entitled, is settled. The other is the case of a covenant to settle after-acquired property." In support of this view no judicial decision is cited, and there are two cases which tend in the opposite direction. In *Milford* v. *Peile* (4), which is more fully

(1) 7 Ves. 137; 6 R. R. 96.
(2) (1839) 4 My. & Cr. 289, 298; 48 R. R. 104, 109.
(3) (1878) 8 Ch. D. 101, 112.
(4) 17 Beav. 602.

reported in 2 W. R. 181, the point seems to have arisen. By a settlement made in 1848, on the marriage of Mrs. Milford, a sum of 10,000*l.* Consols was held by trustees, upon trust either to retain the same in its then present state of investment, or to sell the same and invest the proceeds in other securities, with power to vary securities, and upon trust to pay the income to the wife and husband during their respective lives. The settlement contained a joint and several covenant by Mr. and Mrs. Milford that, in case any real or personal estate to the amount of 100*l.* sterling at any time should during the coverture by gift, devise, bequest, or intestacy, from or of her father, Mr. Thames Locke Lewis, come to or devolve on her, then the same real and personal estate should, by such acts, deeds, and assurances as should be necessary for the purpose, be duly vested in the trustees or trustee for the time being of the marriage settlement, their and his heirs, executors, administrators, and assigns, and be held upon and for such trusts, intents, and purposes, and with, under and subject to such powers, provisos and declarations (as far as the nature of the property would admit) as were thereby declared of and concerning the premises thereby assigned and settled by and on the part of the said Frances Harriott Lewis, and the dividends and annual produce thereof, or such and as many of the same as should be subsisting and capable of taking effect. Mr. Lewis, the father, died in November, 1852, having by his will bequeathed a certain leasehold house and premises, and all the furniture and effects therein, to trustees, in trust for Mrs. Milford for her separate use. The bill was filed by Mrs. Milford against her husband and the trustees to take the opinion of the Court whether the leasehold house and furniture were bound by the covenant, and, if so, whether they should be enjoyed in specie, or be converted into money, and the proceeds invested. The Master of the Rolls (Sir John Romilly) held that the property was bound by the covenant, and was of opinion that there was no trust for conversion in the settlement, and that the property should be assigned to the trustees and enjoyed in specie. *Howe* v. *Earl of*

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*Dartmouth* (1) does not seem to have been cited, and no clear reasons are given for the conclusion arrived at. The decision, however, was inconsistent with the view that the rule in *Howe* v. *Earl of Dartmouth* (1) applied, unless Sir John Romilly relied upon the express option given to the trustees either to retain or to sell.

In the following year, 1855, the question arose for consideration before Kindersley V.-C. in *Hope* v. *Hope*, which is reported only in 1 Jur. (N.S.) 770. By a marriage settlement certain funds were vested in trustees upon trust to pay the interest of one moiety to the wife for her separate use, and upon trust to pay the other moiety to the husband for life, and upon trust after the death of one to pay the interest of the whole to the other, and trusts were declared as to the trust funds after the death of the survivor for the benefit of the children of the marriage; and in the settlement was contained a covenant to settle after-acquired property upon and for the trusts thereinbefore declared as to the funds vested in the trustees as above mentioned: provided always, and it was thereby agreed and declared, that it should be lawful to and for the trustees, at the request in writing of the husband and wife during their joint lives, and of the survivor of them during his or her life, and after the decease of such survivor at the discretion of the trustees, absolutely to sell and dispose of all or any of the real estate or personal estate (not consisting of money, stocks, funds, or securities) which under the covenants thereinbefore contained should become subject to the trusts thereof in manner therein mentioned; and that the trustees should stand and be possessed of the moneys which should arise from such sale or sales upon the like trusts and subject to the like provisions and agreements as were thereinbefore declared and contained of and concerning the funds vested in trustees as above mentioned. The lady's father by his will gave and bequeathed to her his leasehold house in which he then resided, together with certain chattels. He died in 1851, and the leasehold house, which was held for a

(1) 7 Ves. 137; 6 R. R. 96.

term of which twenty-two years were unexpired, was assigned to the trustees of the settlement. A question having arisen as to whether the leasehold house and the specific chattels bequeathed by the will ought to be retained, or ought to be converted into money and the proceeds invested upon the trusts of the settlement, or whether they ought to be enjoyed in specie, a special case was submitted to the Court. *Howe* v. *Earl of Dartmouth* (1) and *Milford* v. *Peile* (2) were cited. Kindersley V.-C. said he was not aware of any case in which the principle of *Howe* v. *Earl of Dartmouth* (1) had been applied to a settlement, which was a contract between the parties, whilst in a will there was no contract. But whatever might be the general principle, in this particular case, so far from there being any trust, implied or otherwise, for conversion, conversion was only to take place at the request of the husband and wife during their lives, and after their death at the discretion of the trustees, the intention being that the property, whatever it was, coming to the wife should be settled. There would therefore be a declaration that the property was not to be converted during the lives of the husband and wife without their request. *Hope* v. *Hope* (3) is important as indicating that, in the opinion of the Vice-Chancellor, the rule does not apply to a marriage settlement, but I cannot treat it as a positive decision to that effect. Under these circumstances, I feel at liberty to follow my own view. And I therefore hold that the rule in *Howe* v. *Earl of Dartmouth* (1) has no application to the present case.

Solicitors for plaintiffs and for General Van Straubenzee's representatives: *Norton, Rose, Norton & Co.*

Solicitors for defendants Cooper and Hale: *Kingsford, Dorman & Co., for Smith, Mammatt, Hale & Quarrell, Ashby-de-la-Zouch.*

Solicitors for Lady Van Straubenzee's representative: *Witham, Roskell, Munster & Weld.*

Solicitors for defendant King: *Le Brasseur & Oakley.*

(1) 7 Ves. 137; 6 R. R. 96. (2) 17 Beav. 602.
(3) 1 Jur. (N.S.) 770.

F. E.

COZENS-HARDY J.

1901

Aug. 6, 8.

## *In re* MAGDALEN COLLEGE, OXFORD.

[1898 S. 1421.]

*Lands Clauses Act—Payment out of Court—Proceeds of Sale of Investments—Brokerage—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 69, 80.

In cases where money has been paid into court under a statute incorporating therewith the Lands Clauses Act, 1845, and has been invested in securities, on a petition by the persons absolutely entitled thereto for payment out of the proceeds of sale of the securities, the costs payable by the promoters that paid in the money include the brokerage payable on the sale.

Under the provisions of the London County Council (Improvements) Act, 1897 (with which the Lands Clauses Consolidation Act, 1845, was incorporated), the London County Council purchased and took, for the purposes of the improvements authorized by the former Act, land belonging to the President and Scholars of the College of St. Mary Magdalen, Oxford, for the sum of 29,000*l.* This money was paid into court, and the land was conveyed to the council.

Pursuant to an order made by North J. dated August 4, 1898, the money was invested in the debenture stock of three railway companies. Part of this stock was sold and the proceeds applied as directed by subsequent orders, but the balance of the stock remained in court.

Under the provisions of the Elementary Education Act, 1870 (with which the Act of 1845 was incorporated), the School Board for London purchased and took for the purposes of the Act of 1870 certain land for the sum of 4500*l.* This money was paid into court, and, pursuant to an order of Byrne J., was invested in New Consols.

The college entered into an agreement to purchase the fee simple in possession of certain hereditaments, and proposed to apply the funds in court in part payment of the purchase-money; and it was also proposed that the balance of the purchase-money should be paid out of funds belonging to them which were under the control of the Board of Agriculture

under the provisions of the Universities and College Estates Acts, 1858 to 1880 and 1898.

The college accordingly presented a petition praying (1.) that the purchase of the hereditaments might be approved by the Court; (2.) that it might be referred to the taxing master to tax the costs of the petitioners (including therein all reasonable charges and expenses incident thereto) of the following matters separately, namely, (*a*) their costs of the reinvestment of the funds in the purchase of the hereditaments; and (*b*) their costs of obtaining the order to be made on the petition, and that the taxing master might be directed to distinguish and certify the respective amounts of the brokerage payable on the sales of the stock and New Consols, and to distinguish the amount of the ad valorem duty upon the conveyance of the hereditaments, and to apportion the same rateably in the proportion which the two funds in court respectively bore to the whole of the purchase-money; (2.) that the county council might be ordered to pay the petitioners one-third part of their taxed costs of the reinvestment, and one moiety of their taxed costs of obtaining the order and of all proceedings relating thereto, and also the brokerage payable on the sale of the railway stock directed by the first payment schedule, and the proportion of the ad valorem duty attributable to that stock; (4.) that a similar order might be made against the school board in respect of the New Consols; (5.) that the funds in court might be dealt with as directed by the payment schedules, the petitioners undertaking to pay to the Chancery broker the brokerage on the sales directed by the schedules.

The schedules directed sales (without deducting brokerage) of the two funds in court, and payment of the proceeds to the Board of Agriculture. The petition was heard on August 6, 1901.

*Vernon Smith, K.C.*, and *Borthwick*, for the petitioners. The only question is as to who shall bear the cost of the brokerage. It seems only reasonable that it should be paid by the bodies which have taken the petitioners' property under their statutory powers.

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*Frederic Thompson*, for the London County Council. This is not a case of reinvestment by the Court. Sect. 80 of the Lands Clauses Act, 1845, empowers the Court to order the promoters of the undertaking to pay the costs, "including all reasonable charges and expenses incident thereto," of, amongst other things, "the investment" of the moneys, and "the reinvestment thereof," and "of all proceedings relating thereto," except those occasioned by litigation between adverse claimants. Under that brokerage is paid on reinvestment by the Court. The section also empowers the Court to order the promoters to pay "the costs of obtaining the proper orders . . . . for the payment out of court of the principal of such moneys, or of the securities whereon the same shall be invested." Payment out of court is equivalent to transfer in the case of securities, and if the petitioners want to have the fund in a different shape they must bear the charges of changing it themselves. No order seems so far to have been made for the council or any other public body to pay the brokerage. [He also referred to s. 69 of the Act of 1845].

*C. T. Mitchell*, for the school board. So far as I can ascertain, the practice has not been to allow the petitioners the costs of brokerage.

*Vernon Smith, K.C.*, in reply. Payment is not the same as transfer. Sect. 80 is not confined to the case of transfer out of securities. If the petitioners want the money paid out in cash they ought to have it free from deductions.

COZENS-HARDY J. I will cause an inquiry to be made as to the practice which has been followed in other cases.

*Cur. adv. vult.*

Aug. 8. COZENS-HARDY J. The question is whether the costs the respondents are to pay are to include the brokerage in respect of the sale of the investments in court. When the petition was argued I expressed some surprise that a point like this should be now open. I have caused inquiries to be made of the registrars and one of the taxing masters, and the result of my inquiries is that the distinction suggested by Mr.

Thompson has never been recognised before, and, so far as I can ascertain, the practice has been to require that the brokerage, payable in the first place by the petitioners, shall be included in the costs payable by the council; and although there is no authority to that effect, it seems to me that the right view has been adopted in practice, and that that view should be adopted by me now.

Sect. 69 of the Lands Clauses Act, 1845, provides the modes in which the purchase-money of lands purchased or taken by promoters is to be applied, and one of these is "payment to any party becoming absolutely entitled to such money."

It has been settled long ago, and it cannot be disputed, and it is not disputed by Mr. Thompson, that in the case of reinvestment in land the council has to pay the brokerage on the sale of the investments in court—in other words, what is to be applied to the purposes of the section is the gross proceeds. But it is said that when money is paid to a person absolutely entitled the brokerage does not come within the costs provided for by s. 80. But that section empowers the Court "to order the costs of the following matters, including therein all reasonable charges and expenses incident thereto, to be paid by the promoters of the undertaking; (that is to say) . . . . the costs of the investment of such moneys in Government or real securities, and of the reinvestment thereof in the purchase of other lands, and also the costs of obtaining the proper orders for any of the purposes aforesaid . . . . and for the payment out of court of the principal of such moneys, or of the securities whereon the same shall be invested, and of all proceedings relating thereto."

Now, I cannot hold that there is any reason on principle, and there is certainly none on the authorities, for treating the brokerage in any different way whether the proceeds of sale of investments in court have to be invested or paid to the party entitled. I must, therefore, make an order in the usual form.

Solicitors for petitioners: *Routh, Stacey & Castle.*
Solicitor for county council: *W. A. Blaxland.*
Solicitor for school board: *C. E. Mortimer.*

F. E.

COZENS-HARDY J.

1901

*Aug.* 9; *Nov.* 2.

## *In re* HOTHAM.
## HOTHAM *v.* DOUGHTY.

[1901 H. 2209.]

*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 21 (*i.*); *s.* 22, *sub-s.* 2—*Tenant for Life—Trustees for Purposes of Act—Investment on Mortgage—Inquiry into Title and Value.*

Upon an investment on mortgage under s. 21 (i.) of the Settled Land Act, 1882, in accordance with a direction by the tenant for life given under s. 22, sub-s. 2, it is the duty of the trustees for the purposes of the Settled Land Acts to satisfy themselves as to value, title, and form of the particular mortgage.

*Semble*, the same principle applies to other investments under s. 21 (i.).

THIS was a summons relating to a proposed investment of capital money on mortgage of realty taken out by Frederick William Hotham, tenant for life of estates settled by the will of Augustus Thomas Hotham, deceased. The defendants were the trustees of the settlement for the purposes of the Settled Land Act. The proposed mortgagor was also before the Court for the purpose of being bound by the decision.

A residential estate, called the Worlingham Hall estate, had been purchased with capital money part of the settled estate. The tenant for life was unable or did not wish to continue to reside at Worlingham Hall, and he entered into a conditional contract dated February 7, 1901, with the Hon. A. J. Mulholland (the proposed mortgagor) for the sale of the Worlingham Hall estate. The contract provided that two-thirds of the purchase-money should remain on mortgage; and also for the sale of the furniture, which belonged to the tenant for life. The contract was approved by the Court subject to alterations that were accepted by the purchaser. The title had been accepted and a draft conveyance approved. The draft of a mortgage of the Worlingham Hall estate to secure 33,724*l.* to the trustees had been prepared on behalf of the tenant for life, and accepted by the purchaser. The trustees objected to some of the provisions of the draft mortgage and

required alterations. They insisted that, in the event of the tenant for life directing the investment of any part of the capital money on mortgage of real estate, they were bound and entitled to satisfy themselves independently as to the value and propriety of the security and as to the title thereto, and to be indemnified as to the costs, charges, and expenses of so doing. The tenant for life insisted that he was a trustee for all parties under s. 53 of the Settled Land Act, 1882, and that the sole responsibility in respect of value and title rested on him. By the summons he asked (1.) "that it might be declared that, upon a direction under s. 22, sub-s. 2, of the Settled Land Act, 1882, given by the applicant as tenant for life under the above-mentioned settlement to the respondents as trustees of the said settlement for the purposes of the Settled Land Act, 1882, to invest capital moneys in their hands as such trustees as aforesaid upon the security of a mortgage referred to in such direction, the respondents, as such trustees as aforesaid, are bound to invest the same accordingly, if such mortgage purports upon its face to be such a mortgage as is by the settlement or by law authorized as an investment of such capital moneys, and that they are not under obligation or entitled to satisfy themselves as to, or examine, or make any inquiry as to the title to or value of the security included in such mortgage, and that they are not entitled to make any alteration in the form of such mortgage." (2.) That costs of the summons as between solicitor and client might be paid out of the capital money.

*Hon. E. C. Macnaghten, K.C.*, and *A. àB. Terrell*, for the tenant for life. Under s. 53 of the Settled Land Act, 1882, the tenant for life, in exercising his powers under the Act, is made a trustee for all persons interested. In directing an investment under s. 22, sub-s. 2, he has an unfettered discretion, and it is his duty and no other person's to inquire into the value, the title, and fitness in every respect of every investment, provided it is authorized by law, and to employ experts: *In re Lord Coleridge's Settlement.* (1) The tenant for

(1) [1895] 2 Ch. 704.

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life in any event is entitled to his costs of employing experts out of the capital money: s. 21 (x.); *In re Llewellin* (1); *In re Smith's Settled Estates.* (2)

*Eve, K.C.*, and *H. Fellows*, for the trustees. *In re Lord Coleridge's Settlement* (3) merely decides that the tenant for life has an absolute discretion to choose the investment within the authorized limits; it does not deprive them of the duty of taking care of the capital. The trustees are appointed for the very purpose of checking the tenant for life in the exercise of his powers—for instance, it has been held that the trustees ought to be separately represented in an appeal by the tenant for life: *In re Broadwater Estate.* (4)

*Davenport*, for the mortgagor.

*Hon. E. C. Macnaghten, K.C.*, in reply.

Nov. 2. COZENS-HARDY J. This summons raises a question as to the respective powers and duties of a tenant for life of a settled estate, and of trustees who have capital money in their hands awaiting investment. Sect. 21 of the Settled Land Act, 1882, prescribes the various modes in which capital money may be invested or applied. Sub-s. 1 authorizes an investment on real securities, not expressly, but by reference to the general law: Trustee Act, 1893, s. 1. By s. 22, sub-s. 2, the investment is to be "according to the direction of the tenant for life." Now, it has been held in *In re Lord Coleridge's Settlement* (3) that, if the tenant for life in good faith directs the trustees to invest in a particular security admittedly authorized by the settlement, such direction is binding, and that it is not for the trustees to say that in their discretion they do not think the investment expedient. The present applicant seeks to treat this as a decision enabling him to say to the trustees, "Invest the capital money on mortgage of the A. estate; you have nothing to do with title or value. That is for me to be satisfied with. You have no further responsibility." The trustees, on the other hand, say that before they can act upon the direction of the tenant for life they must

(1) (1887) 37 Ch. D. 317.
(2) [1891] 3 Ch. 65.
(3) [1895] 2 Ch. 704.
(4) (1885) 33 W. R. 738.

be satisfied that the mortgage is such as the Court considers a proper investment of trust funds, or, in other words, that they must satisfy themselves both as to title and value, and as to the form of mortgage, just as any ordinary trustees would.

I think the latter view is correct. It is remarkable that s. 42, which deals with a contract made by the tenant for life for the purchase, exchange, partition, or lease of settled land which the trustees are at liberty to adopt without inquiry, does not extend to a mortgage. I can see no reason for holding that trustees are bound to be satisfied with the statement of the tenant for life that the particular investment on mortgage which he desires is authorized. It is for the trustees to see that the money is applied in manner directed by the Act. In other words, they are only bound to follow the direction of the tenant for life when they are satisfied that the mortgage is a proper mortgage for trustees to accept. The result is that, when the trustees and the tenant for life act by different solicitors, it will rest with the solicitors for the trustees to do what is necessary with reference to the mortgage.

The observations I have made with respect to a mortgage will apply equally to any other investments under s. 21, sub-s. (i.)

I must, therefore, make a declaration that the trustees are not bound to invest upon a particular mortgage unless and until they are satisfied as to the title and value of the proposed security.

The costs of the summons will be paid out of capital moneys in the hands of the trustees.

Solicitors: *Rowcliffes, Rawle & Co., for Hamilton Fulton, Salisbury; Collyer-Bristow, Hill, Curtis & Dods, for Stone, Simpson & Mason, Tunbridge Wells; Bompas, Bischoff & Co.*

D. P.

FARWELL J.

1901

*Oct.* 30.

# *In re* SHUCKBURGH'S SETTLEMENT. ROBERTSON *v.* SHUCKBURGH.

[1901 S. 2417.]

*Power—Execution—Limited Power—Testamentary Appointment—Incomplete Disposition—Intention—"After the Death of A." read "subject to A.'s Interest."*

Under a marriage settlement the husband and wife took successive life interests in a trust fund, the wife's interest being cut down to one moiety on remarriage, and subject thereto the fund was settled on trust for the issue of the marriage as the husband should appoint, and in default of appointment for the sons at twenty-one or daughters at twenty-one or marriage, with the usual hotchpot clause. By his will, which recited that he had power to appoint the fund after the death of his wife, the husband appointed that "after the death of my said wife" three-fifths of the fund should be held in trust for his elder son and two-fifths for his younger son, these sons being the only issue of the marriage.

The wife having remarried after her husband's death:—

*Held*, that the moiety of the income thereby set free during her life passed under the appointment, the Court finding on the face of the will an intention to appoint the whole fund subject to the wife's interest, and being therefore at liberty, in accordance with the principle in *Maddison* v. *Chapman*, (1858) 4 K. & J. 709, 719, to read the words "after the death of my said wife" as "subject to my said wife's interest."

ORIGINATING SUMMONS.

By a marriage settlement dated June 21, 1879, and made between the intended husband of the first part, the intended wife of the second part, and trustees of the third part, it was declared that the trustees should stand possessed of a sum of 20,000*l.* New 3*l.* per cent. Annuities, and the investments representing the same, upon trust that they should pay the income to the husband during his life, and should from and after his decease, if the wife should survive him, pay the income to the wife during her life unless and in such case until she should remarry, and, if she should remarry, should, as from the day of her remarriage, pay the income of one moiety of the trust premises to her during her life for her separate use without power of anticipation. And from and after the failure or determination of and in the

meantime subject to the trusts thereinbefore declared, the trustees should stand possessed of the trust premises in trust for the issue of the marriage in such shares as the husband should by deed or will appoint; and in default of appointment, in trust for the children of the marriage who being sons should attain the age of twenty-one years, or being daughters should attain that age or marry, in equal shares, with the usual hotch-pot clause. It was further provided that if at the husband's death any of the children of the marriage being sons should be under the age of twenty-one years, or being daughters should be under that age and unmarried, then, subject to any appointment to the contrary, the trustees should, so long as each such child should be under age, and as to a female unmarried, receive the income of the portion to which such child if of full age would for the time being be entitled in possession under the trusts thereinbefore declared, and apply a competent part, or if need be the whole, of the same income in or towards his or her maintenance and education during the continuance of his or her minority, and should accumulate the surplus of such income by investing such surplus in the manner in which the original trust funds were directed to be invested; and the funds so to be acquired should be added to and form part of and be subject to the same powers and provisoes as the principal funds from the surplus income whereof the same should have arisen.

The marriage was celebrated on June 24, 1879.

There was issue of the marriage two children and no more, namely, an elder son born June 20, 1880, and a younger son born February 28, 1882.

On June 5, 1882, the husband made his will, and thereby, after reciting that under his marriage settlement he had power by that his will to appoint that after the death of his wife a sum of 20,000*l.* New 3*l.* per cent. Annuities should be held in trust for the issue of the marriage in such shares as he might think fit, appointed as follows: "Now therefore in pursuance of the power given to me by the said settlement I do hereby appoint that after the death of my said wife the said sum of 20,000*l.* or the investments for the time being representing the

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same shall as to 12,000*l.* thereof or the investments for the time being representing the same be held upon trust for my" elder son, "and as to the sum of 8000*l.* thereof or the investments for the time being representing the same upon trust for my" younger son.

The husband died on January 12, 1884.

The wife remarried on November 25, 1886, thereby setting free the income of one moiety of the trust fund, and the trustees thenceforth accumulated the income of that moiety.

The trust fund was now represented by a sum of 20,000*l.* Consols, and the accumulations by a sum of 3696*l.* India 3½ per cent. stock.

The elder son having attained twenty-one on June 20, 1901, the question arose whether the income of the free moiety of the trust fund during the wife's life was appointed by the husband's will, so that the elder son was now entitled to payment of his proportionate share of that moiety and of the accumulations thereon, or whether the income during that period was unappointed, and ought therefore to be brought into hotchpot under the settlement until the sons' shares were equalised.

The present summons was issued to determine the point.

*Wurtzburg*, for the trustees of the settlement.

*T. T. Methold*, for the elder son. The appointment must be read as an appointment of the entire fund subject to the wife's interest, the rule being that where there is a gift over on one of the events on which prior limitations determine, it is construed as a gift over on any of those events. *Curius* v. *Coponius*, cited in Theobald on Wills, 4th ed. p. 527, but omitted in the 5th edition; *Jones* v. *Westcomb* (1); *In re Akeroyd's Settlement* (2); *In re Jobson* (3); *Stanford* v. *Stanford* (4); Jarman on Wills, 5th ed. p. 760.

The elder son is therefore now entitled to payment of three-fifths of the free moiety of the fund, and three-fifths of the

(1) (1711) 1 Eq. C. Ab. 245, pl. 10; Gilb. 74; Pr. Ch. 316; Tudor's Real Property Cases, 4th ed. p. 470.

(2) [1893] 3 Ch. 363.

(3) (1889) 44 Ch. D. 154.

(4) (1886) 34 Ch. D. 362.

accumulations added thereto under the maintenance and accumulation clause.

*Sargant*, for the younger son. There is no such rule of construction as stated. The authorities merely say that where the intention is manifest on the face of the instrument, the Court may depart from the strict language in order to give effect to that intention: *In re Tredwell.* (1)

In this case there is nothing to shew any such intention, and the will is free from ambiguity as it stands. An application of the so-called rule would render it unintelligible, as the appointment would have to be read as an appointment of the entire fund "after the death or remarriage of my said wife," although in the latter event the prior limitations are only determined to the extent of one moiety.

Again, though the so-called rule has been applied to avoid cases of partial intestacy or resulting trust arising under the same instrument, there being a kind of presumption that the testamentary disposition or declaration of trust of the testator's or settlor's own property is intended to be exhaustive, it has never been applied to aid the incomplete execution of a power created by a prior instrument against the persons entitled in default of appointment under that instrument, no presumption against intestacy or resulting trust arising in that case.

The interim income of the moiety set free by the wife's remarriage is unappointed, and must, therefore, be applied to equalise the sons' shares under the hotchpot clause. There is nothing unreasonable in supposing that this was the testator's intention.

FARWELL J. In construing this will, I must steer between the Scylla of saying what the testator must have meant and the Charybdis of adhering too much to the letter and disregarding the spirit of his words.

On the whole, I have come to the conclusion that he meant to appoint the whole fund subject to the wife's life interest, or such part as existed.

Assuming, without expressing any opinion either way, that

(1) [1891] 2 Ch. 640.

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the younger son is right in saying the presumption against ineffective dispositions, obtaining in the case of a will disposing of a testator's own property, does not apply to an appointment under a power where there is a gift in default of appointment, I find in this will, reading it fairly as a whole, and without calling in the aid of any such presumption, an absolute intention to appoint the entire fund subject to the wife's interest.

It is true that the testator recites that he had power to appoint the fund after the death of his wife. This is an accurate statement as far as it goes, though the power was in fact somewhat wider in the event of the wife's remarrying.

But the reference to the point of time is not so important as the reference to the existence of the wife's interest. She had a life interest in the entirety reducible to one moiety on re-marriage, and I think the testator refers to the death of his wife to shew that he does not intend to displace her interest.

I think this is a fair way of applying principles familiar to the Court. The general principle is clearly stated by Wood V.-C. in *Maddison* v. *Chapman*. (1) Referring to the case where a limitation over, though expressed in the form of a contingent limitation, is in fact dependent upon a condition essential to the determination of the interests previously limited, he says: "I apprehend, the true way of testing limitations of that nature is this: Can the words which in form import contingency, be read as equivalent to 'subject to the interests previously limited'? Take the simplest case: A limitation to A. for life, remainder to B. for life, and, upon the decease of B., 'if A. be dead,' then to C. in fee. There the limitation to C. is apparently made contingent upon the event of A.'s dying in the lifetime of B. Nevertheless, inasmuch as the condition of A.'s death is an event essential to the determination of the interest previously limited to him, the Court reads the devise as if it were to A. for life, remainder to B. for life, and on B.'s death, *subject to A.'s life interest (if any)*, to C. in fee."

Applying this test, it appears to me that the reference to the point of time at which the prior interest determines is not the

(1) 4 K. & J. 709, 719.

material matter. It is the reference to the prior interest itself that is important.

In the present will I think that the true meaning of the words "after the death of my said wife" is "subject to my said wife's interest," and that I am justified in this case in so holding, and thereby giving effect to what I have no doubt the testator really meant. The elder son is, therefore, entitled to payment of three-fifths of the free moiety of the fund and three-fifths of the accumulations.

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Solicitors: *Kays & Jones.*

G. R. A.

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*April* 19, 20, 22, 23.

[1901 M. 906.]

*Injunction—Contract—Electric Energy—Agreement to take the Whole from the Plaintiffs—Implied Contract not to take it from anybody else—Undue Preference—"Similar Circumstances"—Electric Lighting Act*, 1882 (45 & 46 *Vict. c.* 56), *ss.* 19, 20—*Electric Lighting Orders Confirmation (No.* 5) *Act*, 1889 (52 & 53 *Vict. c. clxxxi.*), (*Mid-London*), *ss.* 46, 47, 52.

The defendant signed a form of request to the plaintiff company to supply him with electric energy subject to (inter alia) the following terms: (1.) the consumer agrees to take the whole of the electric energy required for the premises mentioned below from the company for a period of not less than five years; (2.) the charge for electric energy to be 4½*d.* per Board of Trade unit. There was no covenant by the company to supply, nor by the defendant to take, any energy. Similar forms of request had been signed by other persons for different terms of years and at different prices:—

*Held*, that the request was in substance a contract not to take energy from any other person, and that it could be enforced by injunction; that under the Electric Lighting Orders Confirmation (No. 5) Act of 1889, ss. 46 and 52, the contract was valid so far as it created rights between the parties for a term of years; that the words "is entitled" in the last part of s. 19 of the Electric Lighting Act, 1882, meant entitled by agreement with the undertakers; that in making such agreements the undertakers might have regard to "special circumstances" as mentioned in s. 19, e.g., the amount of energy consumed, the expense of supplying it and getting payment, uniformity of demand, and the fact that some

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consumers required the energy by day and some by night; that unless all the circumstances were similar, agreements might therefore be made for different terms and at different rates; and that in this case there had been no undue preference.

THE plaintiffs were a company who supplied electricity in a large district in London, and this was a motion by them to restrain the defendant from taking the electric energy required for his licensed public-house, known as the Red Lion, No. 72, High Holborn, from any person, firm, or company other than the plaintiffs, in breach of an alleged agreement.

On November 16, 1898, the defendant had signed what was called a contract, but in point of fact was a statutory form of request to the plaintiffs, as follows: "I the undersigned request you to supply electric energy as specified below, and I agree to take all such electric energy subject to such of the clauses of the Electric Lighting Acts and the company's provisional orders as relate to the supply of electricity for the parish in which the premises to be supplied are situate, and also subject to the following terms and conditions, viz.: (1.) the consumer agrees to take the whole of the electric energy required for the premises mentioned below from the company for a period of not less than five years; (2.) the charge for electric energy to be $4\frac{1}{2}d.$ per Board of Trade unit." Then followed provisions for registering the supply by meter, power of lamps, repairs, &c., but there was no covenant by the company to supply energy, nor by the defendant to take any. The final clause was as follows: "In the event of the company's standard rate of charges being reduced below the price herein quoted during the continuance of this agreement the consumer is to have the benefit of such reduced rate." Similar forms of request had been signed by other persons for different terms of years, and in one case at the rate of $4d.$ per unit.

In February, 1901, the defendant gave notice to the plaintiffs to disconnect his premises from their system, and made arrangements to get a supply from a rival company, on the ground, as he alleged, that the energy supplied by the plaintiffs was insufficient.

The plaintiffs thereupon commenced this action against the defendant, and moved for an interim injunction.

The motion was not heard out, but the hearing of the action was accelerated and the case was heard with witnesses upon the issues raised in the affidavits.

*Astbury*, *K.C.*, and *Sargant*, for the plaintiff company. The real agreement between the company and the defendant is the negative covenant by him not to take electric energy from anybody else, and that is a covenant which the Court will enforce by injunction.

*Swinfen Eady*, *K.C.*, and *Stewart-Smith*, for the defendant. There is no case for an injunction. Assuming that the contract is valid, there is no agreement in express terms that the defendant will not take energy from any other person. There is no affirmative contract, no obligation to supply or to take any current; and the Court will not grant specific performance of such a contract. Therefore the Court will not imply a negative covenant not to get a supply from elsewhere and enforce that covenant by injunction. The Court never restrains the breach of a contract which it could not specifically perform: *Fothergill* v. *Rowland*. (1) If this is an affirmative contract it is a contract for the sale of goods, and the Court holds that the remedy for breach of such a contract is damages, not injunction: *Whitwood Chemical Co.* v. *Hardman*. (2) That was a question of personal service, and such cases stand on a different footing; but the observations on the construction of the agreement apply to this case. In *Lumley* v. *Wagner* (3), where an injunction was granted, there was an express negative covenant. A contract for the sale of goods and not to sell to anybody else was enforced by injunction in *Donnell* v. *Bennett* (4); but that again was because there was an express negative covenant which enabled Fry J. to distinguish the case from *Fothergill* v. *Rowland*. (1)

[BUCKLEY J. The learned judge relied on *Catt* v. *Tourle*. (5)

(1) (1873) L. R. 17 Eq. 132.
(2) [1891] 2 Ch. 416.
(3) (1852) 1 D. M. & G. 604.
(4) (1883) 22 Ch. D. 835.
(5) (1869) L. R. 4 Ch. 654.

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That was a contract for the sale of goods, and there was no express negative stipulation, but the Court implied one, and enforced it by injunction.]

The real question in that case was whether *Tulk* v. *Moxhay* (1) applied. The contract was one entire thing, and the relief asked was for breach of part of it. In the present case the plaintiffs have suffered no damage, for there is no contract to supply or to take any electric energy. If anything is to be implied, a term must be implied in the contract that they shall supply us with a sufficient amount of energy. The evidence shews that they have failed to do that; so we are justified in repudiating the agreement.

But the contract is invalid altogether as an undue preference. By s. 19 of the Electric Lighting Act of 1882 we are entitled "to a supply on the same terms on which any other company or person in such part of the area is entitled under similar circumstances." Yet the plaintiffs have made contracts to supply other persons for different periods and, in one case, at a lower price, although s. 20 says that the undertakers are not to shew any undue preference. The plaintiffs are not entitled in making these contracts to take into consideration the quantity of energy used, or whether it is used by day or by night. The customer is "entitled" to the full supply, and to have it by day and by night, although he may not desire to use it. The company cannot charge a lower price on account of the length of the term. That is shewn by the analogy of cases on railways: Browne and Theobald's Law of Railways, 3rd ed. p. 410; *Diphwys Casson Slate Co.* v. *Festiniog Ry. Co.* (2); *Holland* v. *Festiniog Ry. Co.* (3) The length of the term is the only consideration suggested for our contract. The company are bound to supply energy—so their doing so is no consideration; but the company has no right to enter into a contract for a term, and the customer cannot give up a statutory right without consideration. Therefore the contract is bad altogether. Public policy is in favour of competition, and the Court will not approve of an agreement of this kind.

(1) (1848) 2 Ph. 774. (2) (1874) 2 Nev. & M. 73.
(3) (1876) 2 Nev. & M. 278.

*Astbury, K.C.*, in reply. The company not only have power to enter into a contract for a term of years, but by s. 46 of the Electric Lighting Orders Confirmation (No. 5) Act, 1889 (52 & 53 Vict. c. clxxxi.), for Mid-London (1), the customer is

(1) Electric Lighting Orders Confirmation (No. 5) Act, 1889 (52 & 53 Vict. c. clxxxi.), (Mid-London), s. 46: "The undertakers shall, upon being required to do so by the owner or occupier of any premises situate within fifty yards from any distributing main of the undertakers in which they are, for the time being, required to maintain or are maintaining a supply of energy for the purposes of general supply to private consumers under this order or any regulations and conditions, subject to which they are authorized to supply energy under this order, give and continue to give a supply of energy for such premises in accordance with the provisions of this order, and of all such regulations and conditions as aforesaid, and they shall furnish and lay any electric lines that may be necessary for the purpose of supplying the maximum power with which any such owner or occupier may be entitled to be supplied under this order, subject to the conditions following; (that is to say,)

"The cost of so much of any electric line for the supply of energy to any owner or occupier as may be laid upon the property of such owner or in the possession of such occupier, and of so much of any such electric lines as it may be necessary to lay for a greater distance than sixty feet from any distributing main of the undertakers, although not on such property, shall, if the undertakers so require, be defrayed by such owner or occupier.

"Every owner or occupier of premises requiring a supply of energy shall—

"Serve a notice upon the undertakers specifying the premises in respect of which such supply is required and the maximum power required to be supplied, and the day (not being an earlier day than a reasonable time after the date of the service of such notice) upon which such supply is required to commence: and

"Enter into a written contract with the undertakers (if required by them so to do) to continue to receive and pay for a supply of energy for a period of at least two years of such an amount that the payment to be made for the same, at the rate of charge for the time being charged by the undertakers for a supply of energy to ordinary consumers within the area of supply, shall not be less than 20*l.* per centum per annum on the outlay incurred by the undertakers in providing any electric lines required under this section to be provided by them for the purpose of such supply, and give to the undertakers (if required by them so to do) security for the payment to them of all moneys which may from time to time become due to them by such owner or occupier in respect of any electric lines to be furnished by the undertakers, and in respect of energy to be supplied by them."

Sect. 47: "The maximum power with which any such consumer shall

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actually required to enter into a written contract with them to receive a supply for at least two years; and by s. 52 the company may make agreements as to the price to be charged. Under s. 19 of the Act of 1882 the company can take into consideration all the circumstances. The railway cases only shew that if there is no difference in the circumstances the rates charged must be the same. Where there is a difference, the rates may also differ: *Denaby Main Colliery Co.* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (1) In the present case the contracts were bonâ fide entered into with regard to the respective circumstances, the amount of energy taken and the time during which it was required. The defendant gave up for five years, in consideration of a reduction in price, his possible right to get energy from a future company, and he was entitled to do that, and the contract is binding. This is a negative covenant, which ought to be enforced. In *Whitwood Chemical Co.* v. *Hardman* (2) Lindley L.J. quotes the judgment of Lord Selborne in *Wolverhampton and Walsall Ry. Co.* v. *London and North Western Ry. Co.* (3) to shew that the principle does

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be entitled to be supplied shall be of such amount as he may from time to time require to be supplied with, not exceeding what may be reasonably anticipated as the maximum consumption on his premises: Provided that where any consumer has required the undertakers to supply him with a maximum power of any specified amount, he shall not be entitled to alter that maximum except upon one month's notice to the undertakers, and any expenses incurred by the undertakers in respect of the service lines by which energy is supplied to the premises of such consumer, or any fittings or apparatus of the undertakers upon such premises, consequent upon such alteration, shall be paid by him to the undertakers, and may be recovered summarily as a civil debt.

"If any difference arises between any such owner or occupier and the undertakers as to what may be reasonably anticipated as the consumption on his premises, such difference shall be determined by arbitration."

Sect. 52: "Subject to the provisions of this order and of the principal Act, and to the right of the consumer to require that he shall be charged according to some one or other of the methods above mentioned in cases where he is entitled to require a supply, the undertakers may make any agreement with a consumer as to the price to be charged for energy, and the mode in which such charges are to be ascertained, and may charge accordingly."

(1) (1885) 11 App. Cas. 97.

(2) [1891] 2 Ch. 416, 427.

(3) (1873) L. R. 16 Eq. 433, 440.

not depend upon whether there is an actual negative clause, but that the substance of the case must be looked at. This is exactly the sort of contract which the Court enforces by injunction: *Printing and Numerical Registering Co.* v. *Sampson.* (1) Damages would be no remedy for the defendant's breach of his agreement; indeed, he himself insists that we have suffered no damage.

BUCKLEY J. stated the facts, and held on the evidence that the energy supplied by the plaintiffs was reasonably such as the defendant was entitled to receive, and continued:—One of the first defences which is raised is this: it is said that the language of the contract is affirmative and not negative, and that the Court is asked to grant an injunction upon the footing that there is a negative covenant, when in point of fact there is none. Now, in dealing with that contention it appears to me that my first duty is to construe the contract, and that, for the purpose of arriving at the true construction of the contract, I must disregard what would be the legal consequences of my construing it in the one way or the other way. I must first find out what it means; and when I have found out what it means, then I must apply proper legal principles to the contract as construed. There is a passage in the judgment of Lord Selborne in *Wolverhampton and Walsall Ry. Co.* v. *London and North Western Ry. Co.* (2) which I desire to read on this part of the case. Referring to *Lumley* v. *Wagner* (3), Lord Selborne said: "With regard to the case of *Lumley* v. *Wagner* (3), to which reference was made, really when it comes to be examined it is not a case which tends in any way to limit the ordinary jurisdiction of this Court to do justice between parties by way of injunction. It was sought in that case to enlarge the jurisdiction on a highly artificial and technical ground, and to extend it to an ordinary case of hiring and service, which is not properly a case of specific performance: the technical distinction being made, that if you find the word 'not' in an agreement—'I will not do a thing'—as well as the

(1) (1875) L. R. 19 Eq. 462. (2) L. R. 16 Eq. 433, 440.
(3) 1 D. M. & G. 604.

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words 'I will,' even although the negative term might have been implied from the positive, yet the Court, refusing to act on an implication of the negative, will act on the expression of it. I can only say that I should think it was the safer and the better rule, if it should eventually be adopted by this Court, to look in all such cases to the substance and not to the form. If the substance of the agreement is such that it would be violated by doing the thing sought to be prevented, then the question will arise whether this is the Court to come to for a remedy. If it is, I cannot think that ought to depend on the use of a negative rather than an affirmative form of expression."

The cases since that, I think, have gone to shew that that which Lord Selborne says would be the true principle if it should eventually be adopted by this Court, has really now been adopted by this Court. The language here is that the consumer agrees to take the whole of the electric energy required for his premises from A. The company was bound to supply under the statute if asked. The consumer asks. The result is that he thereupon had a right as against the plaintiffs to be supplied. The only question for bargain then was the price, which was fixed at $4\frac{1}{2}d$. They were contracting, not affirmatively for the supply of something, but negatively that the defendant would not take from somebody else. There is no affirmative contract here to take anything at all. Ginder does not agree that he will take any energy from the plaintiffs. He says he will take the whole of the electric energy required. It is competent to him to burn gas if he likes, and require no energy. The only thing he was contracting to do was that if he took electric energy he would take it from the plaintiffs. It seems to me the whole essence of that contract is that which is not expressed in words, I agree, but which by implication is really the only thing existing, a contract that he will not take from somebody else. He agrees to take the whole from A., which necessarily implies that he will not take from B. As matter of construction therefore, not by express words but by necessary implication, I think there is here an agreement not to take from others.

In that state of things, how do the authorities stand? In the first place, it is said that in the recent case of *Whitwood Chemical Co.* v. *Hardman* (1), the language was that A. would give the whole of his time to the company's business, which implied that he would not give any to anybody else. I agree that is exactly similar to this in the sense that here it is an agreement that he will take the whole of his required supply, and in *Whitwood Chemical Co.* v. *Hardman* (1) it was that he would give the whole of his time. But when I read the judgments in that case it appears to me that the Lords Justices founded themselves entirely on this—that what they were dealing with was a contract for personal service, which of course this Court will not in general specifically perform. What they pointed out was that the parties were not thinking of contracting there about excluding the manager from acting for another: that was not in their contemplation. What was in their contemplation was that they should enjoy his whole time—that he should give them his service without reservation, but they did not contemplate the negative stipulation that he should not serve others. It being a contract of personal service, it is quite plain, I think, that the Court of Appeal were not prepared to extend the doctrine of *Lumley* v. *Wagner* (2) as to contracts of personal service beyond the case where there exists, as there did in *Lumley* v. *Wagner* (2), express negative words. But, on the other hand, there is *Catt* v. *Tourle* (3), a case equally on all fours with the present as regards the expression, but not a case of personal service. There the words were that the plaintiff should have the exclusive right of supplying all ale, and he asked for an injunction to restrain a person from supplying the ale himself or obtaining it from another person; and succeeded in getting it. The observation which has been made on *Catt* v. *Tourle* (3) is—that it was a case dependent upon the doctrine of *Tulk* v. *Moxhay* (4), because the defendant in the action was a person who bought the land with notice of the covenant in question, and was therefore bound by it. It does not appear

(1) [1891] 2 Ch. 416.
(2) 1 D. M. & G. 604.
(3) L. R. 4 Ch. 654.
(4) 2 Ph. 774.

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to me that that observation has any pertinence. It is quite true, but is immaterial to the case. When the doctrine of *Tulk* v. *Moxhay* (1) is applied it only results in this—that the defendant became bound by a covenant which he had not entered into—he became bound under the *Tulk* v. *Moxhay* (1) doctrine because he had notice. Then the question is, what was the covenant by which he had become bound? It was the same thing as though he had been the original person, a party to the contract containing the words. The Court of Appeal there were of the opinion, under those words, "the exclusive right of supplying," that they were entitled to imply the negative words, and that there was a right to an injunction.

Another case referred to was *Fothergill* v. *Rowland* (2), a decision of Sir George Jessel. That was an action brought by a person who had become entitled to be the purchaser of all the coals raised in a colliery. His vendor was going to sell the colliery to somebody else, and he would therefore not have received them, and the point of the case was that the plaintiff's whole remedy would be in damages. He was simply the purchaser of goods which were going to be delivered to somebody else; he could get the same goods or goods just as good and as suitable for his purpose elsewhere, and his remedy was only in damages. Then there is a decision of Fry J. in *Donnell* v. *Bennett* (3), where the learned judge granted an injunction in a case of a contract for the sale of chattels, because there existed negative words. He was there proceeding upon the existence of negative words. He says this at the beginning of his judgment, after reading or referring to the passage in Lord Selborne's judgment to which I have referred: "that the Court ought to look at what is the nature of the contract between the parties; that if the contract as a whole is the subject of equitable jurisdiction, then an injunction may be granted in support of the contract whether it contain or does not contain a negative stipulation." I think this is such a contract, because it appears to me that the contract

(1) 2 Ph. 774. (2) L. R. 17 Eq. 132.
(3) 22 Ch. D. 835, 837.

for this present purpose is not one for the supply by the plaintiffs to the defendant of electricity—he is not bound to take any. The contract really is a contract, the whole of which is in substance the negative part of it, that he will take the whole from them, involving that he will not take any from anybody else. I therefore think that the fact that the contract is affirmative in form and not negative in form is no ground for refusing an injunction.

The next point arises upon the sections of the Electric Lighting Act. It was argued that this contract was invalid, so far as it created rights as between the plaintiff and defendant for a term of years, because it bound the parties for a term of years. I think that point is answered by the language of the order. The Electric Lighting Orders Confirmation Act of 1889 for Mid-London, s. 46, which is the one which governs this case, provides that the undertakers shall, upon being requested . . . . supply, subject to certain conditions, one of which is that every owner or occupier of premises requiring a supply of energy shall enter into a written contract with the undertakers (if required by them so to do) to continue to receive and pay for a supply of energy for a period of at least two years of such an amount that the payment to be made for the same at the rate of charge for the time being charged by the undertakers shall not be less than 20*l.* per centum on their outlay; and by s. 52 that, "subject to the provisions of this order and of the principal Act, and to the right of the consumer to require that he shall be charged according to some one or other of the methods above mentioned in cases where he is entitled to require a supply, the undertakers may make any agreement with a consumer as to the price to be charged for energy, and the mode in which such charges are to be ascertained, and may charge accordingly."

So that it appears to me that here, subject to complying with the other provisions of the Act and the order, there is express statutory authority given to require a contract from the consumer to continue to receive the supply for a period of at least two years.

The contract here in question is less than that. It does

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not require the consumer to take any at all. He may not receive any, but the contract is that he shall not during a period take from other people. If the statute allows him to be compelled to take from the plaintiffs, a contract which requires him not to take from others is less and not greater than that, and is, therefore, I think, legitimate.

The next point is—that under ss. 19 and 20 of the Electric Lighting Act, 1882, stating them shortly, undue preference must not be given to any particular consumer, and it is said that here there were contracts with other consumers which were different in their terms. I will just mention what those were.

The instances which are given are three. In the case of the Rugby Tavern there was a contract of March, 1898, with one Schultz, who was then the tenant for five years at $4\frac{1}{2}d.$ per unit; in March, 1900, there was a contract with Hatchman (who had become the tenant) for two years at $4\frac{1}{2}d.$; and on February 14, 1901, there was one with Schultz for two years at $4\frac{1}{2}d.$ Therefore the rate in that case was always $4\frac{1}{2}d.$, but the term was sometimes two years and sometimes five. Then there is the case of the Old Thatched House, where there was a contract of June 6, 1899, for three years at $4\frac{1}{2}d.$; again the same rate, but a different term. But the case principally relied upon was one of Gates, who was the owner of a restaurant, and his contracts were these. In 1895 he paid $7\frac{1}{2}d.$, no term of years being fixed. On October 6, 1899, he entered into a contract for one year to pay $4\frac{1}{2}d.$; and on October 8, 1900, he entered into a contract for two years at $4d.$

It is said that there were thus contracts with other customers, either for different terms of years or as regards Gates, at a different rate of payment, and that that is not justified by the Act.

I will refer to ss. 19 and 20 of the Act of Parliament of 1882. Under s. 19, every person within such an area as this is entitled to a supply on the same terms on which any other person in the area "is entitled under similar circumstances to a corresponding supply." Now, that last expression, a person "is entitled," means, I think, is entitled by arrangements made

between him and the company; so that if I find, for instance, that Gates is having light at 4*d.* for a term of two years, and somebody else is having light at 4½*d.* for a term of two years, and somebody else is having light at 4½*d.* for a term of five years, I have to ask—is that a state of things which is not justified by that Act of Parliament? It appears to me that the relevant words here are "under similar circumstances to a corresponding supply." There is left a latitude to the company to make bargains with its customers where circumstances differ, or the supply does not correspond, for different terms. How far may they go is a question of degree. The facts are that Gates is a very large consumer—his bill is stated to be some ten times that of the defendant. Moreover, he is a consumer who burns largely upon the day load as distinguished from the night load—a circumstance which is to these companies of great importance. They are bound to keep their plant running in the day as well as in the night, to some extent at least, because some consumers want current during the day; and to get a consumer who draws on the day load is of use to them, because they are getting some return for running plant during hours which would otherwise be unproductive. May they take that into consideration? I answer, certainly they may. The "circumstances" are not "similar" where the one consumer is on the day load and the other is on the night load.

Then what does a "corresponding supply" mean? Does it mean that you are necessarily to treat the small consumer upon equally advantageous terms with the large consumer? The cost to the company may be very different; greater uniformity of demand, easier and less expensive collection of the amount to be paid are circumstances to which regard must be had.

Then the 20th section goes on to say that "The undertakers shall not, in making any agreements for a supply of electricity, shew any undue preference to any local authority, company, or person, but save as aforesaid, they may make such charges for the supply of electricity, as may be agreed upon, not exceeding the limits of price imposed by or in pursuance of the license, order, or special Act authorizing them to supply electricity."

BUCKLEY J. 1901 METROPOLITAN ELECTRIC SUPPLY COMPANY, LIMITED v. GINDER.

So here I have direct statutory authority, which is supplemented by what I have read from the Confirmation Act of 1889, authorizing them to make charges within the statutory limit, which is 8*d.* a unit, subject, of course, to s. 19 as to similar circumstances and corresponding supply, and subject to this, that they must not unduly prefer.

I fail to find in the facts of this case that there has been any undue preference. Mr. Page, who is the person principally representing the plaintiffs in making these contracts, told me, as I should expect, that he takes the circumstances of each case into consideration, and the price which has to be charged is fixed accordingly.

It seems to me that this is a contract which it was competent for the plaintiffs to make, and that they are entitled to succeed in the action.

I must, therefore, grant an injunction to restrain the defendant, during the residue of the term of five years which is mentioned in the contract of November 16, 1898, from taking the electric energy required for his premises from any person other than the plaintiffs; but I think I must reserve liberty to the defendant to apply, by which I mean this—that if at any time the plaintiffs are not prepared to supply the energy which he wants, or if they supply an energy which is not an efficient supply such as they are bound to give by the Act of Parliament, then I think he ought to be at liberty to apply to be relieved from the operation of the injunction.

Solicitors: *Barlow & Barlow; Sydney Morse.*

H. C. R.

## BARNARD CASTLE URBAN DISTRICT COUNCIL *v.* WILSON.

BUCKLEY J.

1901

*Aug.* 5.

[1901 B. 455.]

*Water Supply—Swimming Bath—School — Charity — Domestic Purposes—Trade, Manufacture, or Business—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss*, 35, 53—*Waterworks Clauses Act*, 1863 (26 & 27 *Vict. c.* 93), *s.* 12—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 51, 56, 57.

The governors of a school carried on as a charity and not for purposes of profit constructed a swimming bath for the use of the scholars. A swimming instructor was kept and fees were charged :—

*Held*, that the school was for certain purposes a business, but that the water supplied to the swimming bath was supplied for domestic purposes within s. 12 of the Waterworks Clauses Act, 1863, and not for a "trade, manufacture, or business."

THE plaintiffs were the urban sanitary authority for the district of Barnard Castle, in the county of Durham, and were authorized under the Public Health Act, 1875, and the Acts incorporated therewith to provide, and did provide, a water supply for the district. Under s. 56 of that Act they might charge for water a water rate assessed on the premises supplied, or might enter into agreements on other terms; by s. 58 they could supply water by measure; and by s. 65 they might supply water for trading purposes on such conditions as might be agreed upon between themselves and the persons supplied.

For the supply of water for domestic purposes the plaintiffs were in the habit of charging a water rate assessed on the net annual value of the premises, and this rate was assessed and levied with the general district rate in one sum. In their scale of charges no distinction was made for supplying water for ordinary baths, though different charges were made for water supplied for various purposes, including a charge of 6*d.* per 1000 gallons for water supplied for trade purposes. The defendants were the governors of the North-Eastern County School, Barnard Castle, which was a charity administered under a scheme settled by the Charity Commissioners in 1882. Under this scheme the school was not carried on for purposes

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of profit, but the tuition fees were treated as part of the income of the foundation, and any part not applied to the purposes specified in the scheme was invested in the name of the official trustee of charitable funds in trust for the foundation in augmentation of its endowment.

The school had accommodation for 300 boarders and fifty day boys, and was supplied with water by the plaintiffs for drinking, washing, cooking, and other domestic purposes at the usual rate, and for cricket ground and steam-boiler by special agreement.

In 1896 the governors erected on their premises a swimming bath with a cubical capacity of 35,000 gallons, and the plaintiffs supplied the water for this bath under a special agreement till March, 1899, when they gave the governors notice that in future the charge for water for the swimming bath would be 6*d.* per 1000 gallons, which was the usual price paid for water supplied in the district for trade purposes. The governors refused to agree to this, and the plaintiffs brought this action against them for a declaration that the governors were not entitled to demand and receive from the plaintiffs a supply of water for the swimming bath as for domestic purposes within the meaning of the Waterworks Clauses Acts, 1847 and 1863, as incorporated by the Public Health Act, 1875, and that the plaintiffs were entitled to payment from the defendants for the bath at the rate of 6*d.* per 1000 gallons, and that the plaintiffs were entitled to cut off the water till payment was made, and an injunction to restrain the defendants from taking the water except as water for purposes other than domestic purposes within the meaning of the Acts.

The prospectus of the school stated that a swimming bath was provided, and that the swimming-bath fee was 3*s.* 6*d.* a term, payable by every boarder. A swimming master was kept to instruct the boys, and a fee was paid by such day boys as used the bath.

*S. G. Lushington*, for the district council. The plaintiffs have no special Act; their powers are derived from the Public Health Act, 1875, ss. 51, 56, 57, 58, 60. That Act incorporates

part of the Waterworks Clauses Act, 1847, and the Waterworks Clauses Act, 1863. By s. 12 of the Act of 1863 a distinction is drawn between water supplied for domestic purposes and water supplied for the purposes of a trade, manufacture, or business. We admit that water supplied for washing purposes in a private house would be supplied for domestic purposes, and that that would include a swimming bath in a private house. The Acts attach no weight to the amount of water supplied: the question is the purpose for which it is supplied.

The swimming bath which the defendants have constructed is used for the purposes of a business. It is not on private premises. The defendants carry on the school as a business. They keep a master to teach swimming, and advertise the bath in their prospectus as an attraction to the school. Therefore the water supplied for it is on a different footing from that supplied to the school for washing, cooking, and other purposes which the plaintiffs have always treated as domestic. Carrying on a school is a trade, although for some purposes it is treated as a family: *Wauton* v. *Coppard* (1); *Doe* v. *Keeling* (2); *Rolls* v. *Miller*. (3) This school is a business although it is a charity: *Rolls* v. *Miller* (3); *German* v. *Chapman*. (4)

Sect. 65 of the Public Health Act, 1875, which enables a public body to charge by agreement for public baths, is the only section in the Acts which refers to baths; so that no extra charge can be made for private baths unless it is provided for by a special Act. The defendants will rely upon *Liskeard Union* v. *Liskeard Waterworks Co.* (5)

[BUCKLEY J. That shews that there may be domestic purposes in an institution established for a public purpose. (6)]

The purposes can be divided, and it is clear that the purposes of this bath are educational—not part of the boys' home. That is proved by the fact that boys who use the bath, but do not live in the home, have to pay a fee for the bath: *Busby* v. *Chesterfield Waterworks and Gas Light Co.* (7) The water

(1) [1899] 1 Ch. 92.
(2) (1813) 1 M. & S. 95; 14 R. R. 405.
(3) (1884) 27 Ch. D. 71.
(4) (1877) 7 Ch. D. 271.
(5) (1881) 7 Q. B. D. 505.
(6) 7 Q. B. D. 508.
(7) (1858) E. B. & E. 176.

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for this bath comes through pipes which supply other houses; so we cannot cut off the water: s. 74 of the Waterworks Clauses Act, 1847. But the defendants ought not to be allowed to continue to use the water as they threaten to do.

*R. Cunningham Glen*, for the defendants. The swimming bath is of no value for separate assessment unless it is full of water, and that depends on the plaintiffs. Under s. 12 of the Act of 1875 all purposes are domestic, except some which are specially mentioned and do not include baths. Therefore the only exception which can help the plaintiffs is that of water supplied for a business. To come within the section the business must be in the nature of a trade: *Liskeard Union* v. *Liskeard Waterworks Co.* (1) It must be carried on as a commercial undertaking: *Smith* v. *Anderson* (2), and there is nothing commercial about this school. If it is a business, it is that of educating boys. Boarding and maintaining them is not a business, and there is no difference between providing them with a swimming bath and providing them with food. No profit is made out of the baths. Even if this is a business, the swimming bath is provided for domestic purposes and not for the business: *Liskeard Union* v. *Liskeard Waterworks Co.* (1) The plaintiffs can only under the Acts charge for water by a rate, or in certain cases by agreement. In their scale of charges they do not mention swimming baths; and in fact they have made no provision for supplying them, and can only charge in the general rate: *Weaver* v. *Cardiff Corporation.* (3)

*Lushington*, in reply. There is nothing to shew that to come within the section the business must be profitable. In *Weaver* v. *Cardiff Corporation* (3) the water company had a special Act which provided that water supplied for domestic purposes was not to include baths.

BUCKLEY J. The plaintiffs in this action are the Barnard Castle Urban District Council, who, under the Public Health Act, 1875, are authorized to supply water to that district, and the defendants represent the governors of the North-Eastern

(1) 7 Q. B. D. 505. (2) (1879) 15 Ch. D. 247.
(3) (1883) 48 L. T. 906.

County School at Barnard Castle, who in 1896 erected a swimming bath. The boys are some 350 in number, and the bath consumes about 35,000 gallons a fortnight. The whole question between the parties is whether the supply of water to that bath is a supply for domestic purposes or for a "trade, manufacture, or business." It appears to me that an undertaking consisting of a school for 350 boys is for certain purposes a business. I find that Lord Ellenborough in *Doe* v. *Keeling* (1) held that an assignment of a lease to a schoolmaster was a breach of a covenant "not to use or exercise, or permit or suffer to be used or exercised, upon the demised premises or any part thereof any trade or business whatsoever, &c., without the licence of the lessor," &c., and, in the recent case of *Rolls* v. *Miller* (2), the Court of Appeal held that a charitable institution called a "home for working girls," where the inmates were provided with board and lodging, whether any payment was taken or not, was a business, and came within the restrictions of a covenant not to use, exercise, or carry on upon the premises any trade or business of any description whatsoever.

For certain purposes I think this school is a business, and none the less by reason of the fact that the school is not carried on for profit, and that the receipts from the boys are applied to the augmentation of the foundation. But what I have to decide is whether within s. 12 of the Waterworks Clauses Act, 1863, which contrasts a supply for domestic purposes with a supply for a trade, manufacture, or business, this is a supply for domestic purposes or one for the purposes of a business. The only sections which have any bearing on the matter in the Public Health Act, 1875, are ss. 56 and 65. The effect of s. 56 is that where a local authority supplies water it may charge a water rate, to be assessed on the net annual value of the premises in the manner pointed out, or it may enter into an agreement as to the terms on which water is to be supplied, the effect of which is that it may make an assessment as of right in default of an agreement which may be made if the parties please. Sect. 65 enables the

(1) 1 M. & S. 95; 14 R. R. 405. (2) 27 Ch. D. 71.

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local authority to supply water for public baths or wash-houses on the terms of an agreement, or to construct works to supply water for public baths or wash-houses. This is the only section which expressly applies to baths. I have therefore to deal with a series of enactments in which there is no provision about baths except one which refers to public baths. In this state of things counsel for the plaintiffs do not contest that a supply of water to an ordinary bath-room in a private residence would not be a supply for the purposes of a trade, manufacture, or business. There is authority for that in the case of *Weaver* v. *Cardiff Corporation* (1), in which it was held that when a special Act required a company to supply water for domestic purposes, not including a supply for baths, wash-houses, or public purposes, a fixed bath connected with the water service and used by a private resident was not within the exception. Beyond that, counsel for the plaintiffs does not contest the proposition that if the owner of a private residence constructed a swimming bath on his premises for his own use the water supplied to that bath would be supplied for domestic purposes. But he says that this is a different case because the school is a business, and the supply of water for this swimming bath is a supply for the purposes of that business. The business, if it be one, is that of receiving the boys, feeding them, teaching them, and housing them during the school term; and if the plaintiffs' proposition is true, the supply of water for the use of the boys for washing their hands or cooking their meals would be a supply for the purposes of that business. It seems to me that that is an extravagant proposition, and I ask myself whether I ought to draw a distinction between water supplied for ordinary domestic purposes and water supplied for this swimming bath. I think it is impossible to say that this swimming bath is a business as distinguished from the other purposes for which the school is carried on. If the governors had a gymnasium, could it be said that they carried on business as gymnasium proprietors? If they taught carpentering, could it be said that they carried on business as carpenters? I answer, certainly not. Their

(1) 48 L. T. 906.

business is the whole business of the school, and the swimming bath is only a part of that whole. The true answer is, that in s. 12 of the Act of 1863 you have to read the words "trade, manufacture, or business" in contrast with "domestic purposes"; and directly you find that the water is supplied for domestic purposes, even though it is supplied for the domestic purposes of the business of keeping a school, it is a supply for domestic purposes and not for a business. The nearest case to this is *Liskeard Union* v. *Liskeard Waterworks Co.* (1) That was a case about a workhouse, and it was argued that the maintenance of a workhouse was a public, not a private purpose, and that water supplied for it was not supplied for domestic purposes. Lord Coleridge uses these words (2): "No doubt this is true, but in the prosecution of that which is a public purpose there may be domestic uses, and this is one." And he gives as an instance that "Every large family is partly made up of persons quite unconnected by ties of blood or marriage, and the number of those so connected may bear a very small proportion to the whole number of persons collected together, as, for instance, in the case of a school, where a number of persons of different families are collected from different places, but under one head, and one roof, and are for all practical purposes one family." It seems to me that that is the real way to treat this case. All these boys constitute for the purpose of this question one family, one establishment, and the supply of water to them is as much a supply for domestic purposes as the supply to the masters or any other members of the family; and if it is conceded, as it is, that in a private residence there is no distinction between water supplied to swimming baths and water supplied for ordinary washing purposes, it follows that the water supplied to this bath is supplied for domestic purposes, and the plaintiffs must fail.

Solicitors: *Doyle, Devonshire & Woodhouse, for J. Ingram Dawson, Barnard Castle; Huntington & Leaf, for A. T. Piper, Barnard Castle.*

(1) 7 Q. B. D. 505.

(2) 7 Q. B. D. 508.

H. C. R.

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1901
*Jan.* 19, 26;
*July* 13.

## *In re* MADDY'S ESTATE.
## MADDY *v.* MADDY.

[1900 M. 3094.]

*Married Woman—Agreement for a Settlement—Reversionary Interest in Personalty subject to Power of Appointment—Exercise of Power—"Usual" Clauses—Covenant to Settle After-acquired Property.*

By the marriage settlement of M., dated in 1854, property was settled upon trust, after the deaths of himself and his wife, for the children of the marriage as M. and his wife should jointly appoint; and in default of such appointment, as the survivor should appoint; and in default of any appointment, in trust for all the children who should attain twenty-one in equal shares. There were only two children who attained twenty-one. One of them, C., by an ante-nuptial agreement, agreed to settle "all her half or other share and interest whatsoever" in the property subject to the trusts of the original settlement. The agreement provided that the settlement should contain certain specified provisions, and generally such other agreements, clauses, and provisions as were "usually inserted in settlements of a like kind." M. and his wife, who predeceased him, made no joint appointment under the deed of 1854, but by his will, in exercise of his power, he appointed the sum of 2000*l.* to C. absolutely:—

*Held*, that a covenant to settle after-acquired property was not a "usual" clause in settlements of a like kind with that to be executed in accordance with the agreement for a settlement, and that the 2000*l.* was not bound by the agreement.

Adjourned Summons.

By an indenture of settlement dated January 11, 1854 (being the marriage settlement of the testator, Edwin Maddy), certain funds were settled upon trust after the death of the testator and his wife for the children of the marriage as the testator and his wife should by deed jointly appoint; and in default of such appointment, as the survivor of them should by deed or will appoint; and in default of any appointment, in trust for all the children of the marriage who being sons should attain the age of twenty-one years, or being daughters should attain that age or marry; and if more than one, in equal shares. The settlement also contained the usual hotchpot clause. There were only two children of the marriage, both daughters, who attained twenty-one. One of them in 1893

intermarried with Mr. G. B. Castell; the other became Mrs. Arding. By an ante-nuptial agreement dated October 13, 1893, reciting that the intended wife (afterwards Mrs. Castell) was entitled in reversion expectant on the decease of her father or otherwise to a moiety of the funds and property subject to the trusts of the indenture of January 11, 1854, it was agreed that, as soon as could be after the marriage, Mrs. Castell should assign or assure to trustees to be nominated by her "all her half-share or other share and interest whatsoever in the funds and property which are now or may hereafter become subject to the trusts of the said settlement," to be held by them upon trusts thereinafter declared. The agreement provided that the settlement should contain certain specified provisions, and should also "contain generally such other agreements, clauses, and provisions as are usually inserted in settlements of a like kind."

The testator, having survived his wife, who had not joined in making any appointment under the indenture of January 11, 1854, by his will dated in 1894, in exercise of his power under the said indenture, appointed the sum of 2000*l.* to Mrs. Castell absolutely.

The testator had in 1880, upon the occasion of the marriage of his daughter Mrs. Arding, appointed to her one moiety of the fund settled by the indenture of 1854 subject to his life interest thereunder.

The testator died in 1899.

This summons was taken out by the executors and trustees of his will for the determination of the question (inter alia) whether the sum of 2000*l.* appointed by the testator to Mrs. Castell absolutely was bound by the agreement of October 13, 1893.

*Brinton*, for the trustees.

*E. P. Hewitt*, for Mrs. Castell. The 2000*l.* is not bound by the agreement. The exercise of the appointment gives the appointee a new and distinct interest. What Mrs. Castell agreed to assign was all her then present interest. The exercise of the power put an end to her then present interest, and

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gave her a new interest which was not covered by her agreement to settle. There is no estoppel by reason of the recital as to her then interest. The recital was perfectly accurate so far as it went. The point is covered by authority: *Lee* v. *Olding* (1); *In re Vizard's Trusts* (2); *Sweetapple* v. *Horlock* (3); *Lovett* v. *Lovett*. (4) [He also referred to Williams on Bankruptcy, 7th ed. p. 192, and Farwell on Powers, 2nd ed. p. 276.]

*J. M. Paterson*, for Mrs. Arding. This fund is clearly bound by the agreement. *Sweetapple* v. *Horlock* (3) was a very different case. Here there is no qualification at all; the words are sufficient to cover an interest arising under the exercise of the power. There is a clear estoppel here; the circumstances in *Lovett* v. *Lovett* (4) were altogether different in that respect.

*F. Thompson* and *E. S. Ford*, for other parties.

*Cur. adv. vult.*

Jan. 26. JOYCE J. (after stating the facts and referring to the documents). With regard to the question of estoppel, the recital upon which that suggestion is founded was perfectly accurate, and in my opinion no case of estoppel arises. Having considered the decisions in *In re Vizard's Trusts* (2), *Sweetapple* v. *Horlock* (3), and *Lovett* v. *Lovett* (4), I have come to the conclusion that the agreement of October 13, 1893, did not comprise anything but the then present interest of Mrs. Castell, and, therefore, if the case rested there, I should hold that the 2000*l.* was not bound by the agreement. Then the question arises whether a provision for the settlement of after-acquired property is a "usual" clause in such a document. That is a question of fact. I am not prepared to say whether such a clause is or is not "usual." All that I now decide is that the 2000*l.* is not bound by the agreement for settlement, without prejudice to the question whether it would be bound if a provision for the settlement of after-acquired property is usual

(1) (1856) 25 L. J. (Ch.) 580.
(2) (1866) L. R. 1 Ch. 588.
(3) (1879) 11 Ch. D. 745.
(4) [1898] 1 Ch. 82.

and ought to be inserted in the settlement to be executed in accordance with the agreement. There will be liberty to apply as to the determination of the question whether a provision for the settlement of after-acquired property is or is not "usually" inserted in settlements of a like kind with that to be executed in accordance with the agreement of October 13, 1893.

Under the liberty to apply as above reserved, the trustees and executors took out a further summons for the determination of the question, and by way of evidence obtained the opinions of Mr. E. P. Wolstenholme and Mr. Spencer Butler, two of the conveyancing counsel to the Court, as to the usage of conveyancers in this respect.

Mr. Wolstenholme's opinion was as follows: "According to my experience the usage of conveyancers does not, in the case of an agreement such as that above used, require the insertion in a marriage settlement of a covenant by the intended wife to settle her other property not expressly settled or agreed to be settled by the settlement, and I consider it is not a 'usual clause,' which expression means a clause usual and proper in the opinion of the draftsman to carry into effect the express terms of the settlement agreed upon. The covenant in question is in fact an additional settlement, and (especially since the Married Women's Property Act, 1882) should not in my opinion be inserted by the draftsman without express instructions, or without calling the attention of the parties to it and asking whether they agree to it. This would be quite unnecessary in the case of a 'usual clause.' Moreover, the covenant cannot always be in the same form. For instance, it nearly always contains exceptions of property less than 200*l.*, or perhaps 500*l.*, in value, and of jewels, furniture, and other matters, and therefore must be the subject of express agreement. If the covenant is a 'usual' clause, there must be a usual form for it; but the numerous cases on the construction of such a covenant shew that the form of it is very different in different cases. The form in a precedent book is often altered in some way."

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Mr. Spencer Butler's opinion upon the point was as follows: "A provision for settling other and after-acquired property of the wife is not a provision of universal expediency. It is not a provision which the Court always requires in a settlement of an infant's property. The usage of conveyancers does not in my opinion require the insertion of such a provision in a settlement to be executed in accordance with the above-mentioned agreement. The usage of conveyancers as to the 'usual' or 'proper' covenant to be inserted in a lease is based, it may be remembered, on decisions of the Court, and is not in favour of a wide extension of ambiguous expressions."

These two opinions were verified by the affidavit of the solicitor to the trustees who had submitted the case to counsel, and were tendered in evidence upon the hearing of the summons, which came before the Court on July 13.

JOYCE J. said that the proper course would have been for the conveyancing counsel themselves to have made affidavits and to have embodied their opinions therein; but, none of the parties objecting, his Lordship admitted the opinions as evidence, and upon that evidence he held that the 2000*l.* was not bound by the agreement for a settlement.

Solicitors: *Field, Roscoe & Co.; H. P. Duggan.*

G. A. S.

## TURNER *v.* MOON.

JOYCE J.

1901

*July* 2, 3, 4, 27.

[1900 T. 1722.]

*Vendor and Purchaser—Conveyance—Covenant for Title—Breach—Measure of Damages—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict.* c. 41), s. 7.

By an indenture of conveyance, dated in 1898, the defendant as beneficial owner granted to the plaintiff, his heirs and assigns, certain land subject to specified rights of way over a road forming part of the property which had been previously granted by the defendant to other persons. The land was bought and sold for building purposes, and the plaintiff having built a house thereon discovered that, in addition to the rights of way specified in the conveyance, there existed a further right of way over the road, which had been granted by the defendant in 1891 to another person and was innocently undisclosed by him.

In an action for damages for breach of the covenant for title implied by s. 7 of the Conveyancing Act, 1881:—

*Held*, that the breach was single, entire, and complete upon the execution of the conveyance; and that the proper measure of damages was the difference between the value of the property as it purported to be conveyed, and its value as the vendor had power to convey it.

In 1891 the defendant, who was the owner of land at Godalming in Surrey known as the Westbrook estate, sold a portion of it, including a house called Westbrook House, to the Countess of Meath. The conveyance was dated June 24, 1891, and by it the defendant granted to the Countess, in addition to the house and land, a right of way over a private occupation road called Westbrook Road, forming part of the estate still retained by the defendant. Westbrook Road was made for the purpose of laying out the property for building. It traversed the whole of the estate, passed through that portion of it which was sold to the Countess of Meath in front of Westbrook House, and afforded communication with the town of Godalming.

The defendant subsequently sold other portions of the estate to persons named Cooper, Fleming, and Parry, to whom he also granted rights of way over Westbrook Road.

By an indenture dated December 9, 1898, the defendant sold

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to the plaintiff a further portion of the estate, including a strip of land forming part of the Westbrook Road, at the price of 4660*l*. The conveyance recited that the defendant was seised of the premises in fee simple free from incumbrances except as thereinafter mentioned, and by the operative part of the deed the defendant as beneficial owner conveyed the premises to the plaintiff in fee simple, subject as to the strip of land forming part of the Westbrook Road to the rights of way thereover specified in the 2nd schedule to the deed. The 2nd schedule to the deed specified the rights of way which had been granted by the defendant to Cooper, Fleming, and Parry over the strip of land forming part of the Westbrook Road, but made no mention of the right of way which had been granted by the defendant to the Countess of Meath. The plaintiff having discovered the existence of the right of way granted to the Countess of Meath, brought this action claiming damages for the breach by the defendant of the covenant for title on his part by virtue of s. 7 of the Conveyancing Act, 1881, impliedly contained in the indenture of conveyance of December 9, 1898.

The plaintiff had built a residence for his own occupation upon a portion of the land bought by him from the defendant. The Countess of Meath had established in Westbrook House a home for epileptic patients, and the plaintiff alleged that the right of way possessed by the Countess over Westbrook Road in respect of her property would injuriously affect the plaintiff's property by destroying the privacy and amenity thereof. At the hearing of the action a question arose as to the proper measure of the damages claimed for breach of the implied covenants for title, and on this question alone the case is reported.

*Younger*, *K.C.*, and *G. Cave*, for the plaintiff. In assessing the damages the fact that the land was sold for building and has been built upon should be taken into account: *Bunny* v. *Hopkinson*. (1) In Mayne on Damages, 6th ed. p. 106, it is stated as the result of the decisions that damages arising subsequent to action brought may be taken into consideration

(1) (1859) 27 Beav. 565.

where they are the natural and necessary result of the act complained of. Here the damages are increased by the fact of the land having been built upon, and that is the natural and necessary result of the act complained of, namely, the breach of the covenant for title: see also *Lock* v. *Furze* (1) and *Rolph* v. *Crouch*. (2)

*Hughes*, *K.C.*, and *H. L. Manby*, for the defendant. A distinction must be drawn between the case of damages arising from the breach of a covenant for quiet enjoyment and that of a breach of covenant for title. This distinction is pointed out in Dart on Vendors and Purchasers, 6th ed. p. 894. The true measure of damages in such a case as this is the difference at the time of conveyance between the value of the property as expressed to be conveyed, and its value as the vendor had power to convey it.

[They also referred to *Hadley* v. *Baxendale*. (3)]

July 27. JOYCE J. The claim is for damages for breach of covenant for title, or rather the implied covenants for title, upon the sale which was completed by the conveyance of December 9, 1898, whereby the defendant as beneficial owner conveyed to the plaintiff certain lands which are specified in the conveyance, to hold the same to the use of the plaintiff, his heirs and assigns, and so on; and then, passing over some words that are immaterial, "as to the said strip of land coloured brown"—a piece of road—"on the said plan A, subject to the rights of way thereover specified in the second schedule hereto." Now, under the Conveyancing Act, 1881, s. 7, there is an implied covenant in that conveyance to this effect: [His Lordship read the terms of the covenant implied by the Act, and continued:—]

Now it turns out that the piece of road in question is subject also to a certain right of way not mentioned in Sched. II., granted by the deed of June 24, 1891, to the Countess of Meath, who then purchased a portion of the Westbrook estate with a residence thereon, which is at present used by her as an

(1) (1866) L. R. 1 C. P. 441. (2) (1867) L. R. 3 Ex. 44.
(3) (1854) 9 Ex. 341.

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institution for the reception of epileptic women and girls. By an unfortunate accident this right of way was omitted to be mentioned in the conveyance to the plaintiff, although no fraud or deceit on the part of the vendor is alleged or suggested.

Undoubtedly, however, there was a breach of that part of the implied covenant for title whereby the vendor covenants that the estate is to be "freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against all such estates, claims, incumbrances, and demands other than those subject to which the conveyance is expressly made." There has been no breach of any other part of the implied covenant, for the plaintiff has not been evicted or disturbed in any way—in fact, the plaintiff has not sustained any actual damage at all. There is no evidence that the Countess of Meath, or any occupier or inmate of her institution, has ever sought to exercise the right of way which was granted to the Countess by the deed of 1891. In other words, there has been no actual interference with the enjoyment of what the deed of December 9, 1898, purported to convey to the plaintiff. Such breach as there has been of the part of the covenant for good right to convey, in my opinion, occurred and was complete upon the execution of the conveyance of December 9, 1898. It was single, entire, and perfect in the first instance. From the moment of the delivery of the conveyance, the Statute of Limitations in respect of this breach commenced to run: see Preston's edition of Sheppard's Touchstone, p. 170, and especially the judgment of Lord Bramwell in *Spoor* v. *Green*. (1) Bramwell B. in his judgment in that case said (2): "Assuming the breach to be correctly stated and proved, I am of opinion that the Statute of Limitations is a bar to it. It was completed, if it ever existed, at the time the deed was executed. If Jamieson had recovered on it, or released it, no further action on it could have been maintained by him, nor, consequently, by his assignee. It is not what is called a continuing breach, any more than not paying money is a continuing breach. The covenant remains broken indeed, but broken once for all. In the case of a covenant to repair,

(1) (1874) L. R. 9 Ex. 99. (2) L. R. 9 Ex. 110.

the breach is continuing, because the covenant is broken afresh every day the premises are out of repair, and when an action is brought for breach of such a covenant, the plaintiff does not recover the value of the repairs, because he may recover again if the want of repair still continues. Nothing like that exists as to this covenant. If the words of the breach are looked at, it will be seen that they are, that neither the defendant nor Pearson had good title, but, on the contrary (and this is the breach), Smith and Sharp at the time of making the deed, and thence continually had title, &c. It is true that the Court in *Kingdon* v. *Nottle* (1) speak of the breach as a continuing breach. Oddly enough, the breach assigned there is express, that the defendant at the time of the execution of the indenture was not seised, &c. But the Court having in the previous case of *Kingdon* v. *Nottle* (1) held that the executor could not maintain an action on this covenant, now held that the real representative could, and it is in reference to this that they use the language I mention."

With this judgment of Lord Bramwell I desire respectfully to express my entire concurrence. The concluding sentence of the passage I have read supplies the key to the true explanation of the judgment of Lord Ellenborough in *Kingdon* v. *Nottle* (1), which has been a good deal discussed in this country, and has been vigorously assailed on the other side of the Atlantic: see Rawle upon Covenants for Title. Fortunately the plaintiff, Mr. Turner, is still living, and we have not to consider who could have sued, or how the case would have stood in the event of his decease before action brought, or pending the action: see Williams on Executors, 9th ed. p. 712 et seq. In my opinion, the proper measure of damages in the present case is the difference between the purchase-money, or price paid upon the purchase of December 9, 1898, and the value of the premises as conveyed, such difference being caused by the defect in the title to the strip of road in question, or, in other words, to the existence of the Countess of Meath's right of way over that strip—that is to say, the difference between the value of the property as purported to be conveyed, and that which the

(1) (1815) 4 M. & S. 53; 16 R. R. 379.

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vendor had power to convey: see *Gray* v. *Briscoe* (1) and Dart on Vendors and Purchasers, 6th ed. p. 892 et seq. In *Bunny* v. *Hopkinson* (2) there had been eviction and a breach, not only of the covenant for title, but also of the covenant for quiet enjoyment, and the claim made and adjudicated upon in that case was upon the covenants for title generally, including the covenant for quiet enjoyment.

Solicitor for plaintiff: *G. R. Fletcher.*

Solicitors for defendant: *Crowders, Vizard & Oldham, for R. H. Mellersh, Godalming.*

G. A. S.

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JOYCE J. 1901 Oct. 25.

## *In re* LEVERIDGE. SPAIN *v.* LEJOINDRE.

[1901 L. 1214.]

*Will—Construction—Estate Duty—Settlement Estate Duty—Direction to Pay Estate Duty out of Residuary Personalty.*

A testatrix by a will made in 1899 settled certain real property upon several persons in succession, and directed her trustees to stand possessed of her residuary personal estate upon trust to pay (amongst other things) the estate duty on the whole of the real and personal estate devised and bequeathed by her will:—

*Held*, that "estate duty" included settlement estate duty.

ADJOURNED SUMMONS.

Catherine Hayes Leveridge, widow, by her will dated January 11, 1899, after appointing the plaintiffs her executors and trustees and bequeathing certain pecuniary legacies, devised certain real estate to her trustees upon trust for certain persons in succession, and in particular devised a freehold shop in Rochester upon trust for the defendants H. R. Lejoindre and Emma Smith for their lives in equal shares as tenants in common, and upon the death of either of them upon trust for the survivor for his or her life, and after the decease of the survivor upon trust for the plaintiff H. A. Spain in fee; and the will contained a residuary gift of real estate. The testatrix

(1) (1607) Noy, 142. (2) 27 Beav. 565.

then directed her trustees to stand possessed of her residuary personal estate upon trust to pay her debts and funeral and testamentary expenses and the legacies therein bequeathed by her, "and also the estate duty on the whole of the real and personal estate devised and bequeathed by this my will as well as the legacy, succession and annuity duties and other moneys hereinbefore directed to be paid thereout." And the testatrix bequeathed the ultimate residue of her personal estate upon trust for charitable purposes.

The testatrix on May 24, 1899, made a codicil to her will not material to the present purpose, and she died on December 27, 1899.

This summons was taken out by the trustees and executors to have it determined whether the settlement estate duty payable on the death of the testatrix in respect of the respective properties settled by her will ought to be paid out of her residuary personal estate or out of the settled properties.

*A. E. Balfour*, for the plaintiffs.

*Austen-Cartmell*, for the defendants H. R. Lejoindre and Emma Smith. Upon the construction of this will the term "estate duty" is used to include settlement estate duty. Sect. 1 of the Finance Act, 1894, imposes estate duty generally. Sect. 5, sub-s. 1, imposes "a further estate duty called settlement estate duty." Sect. 17 gives the rates of the duties, and it fixes the rate of the settlement estate duty at 1 per cent. Sect. 22 defines estate duty as meaning "estate duty under this Act." Settlement estate duty is not mentioned in terms in the Act except in ss. 5 and 17, above referred to, and in s. 21. In the various sections of the Act which deal with the charging and recovery of the duty the term "estate duty" includes settlement estate duty; otherwise the Act provides no means of charging or recovering that duty: see ss. 6, 8, 9.

Throughout the Act, in what may be called the general sections, "estate duty" comprises both the graduated duty and the fixed additional duty of 1 per cent. This was the view of the Act taken by North J. in *In re Webber* (1), and although

(1) [1896] 1 Ch. 914, 920.

JOYCE J. 1901 LEVERIDGE, *In re.* SPAIN *v.* LEJOINDRE.

the actual decision in that case was overruled by the Court of Appeal in *In re Maryon-Wilson* (1), the judgments of the Court of Appeal contain nothing which throws any doubt upon this view.

*R. J. Parker*, for the Attorney-General. Estate duty is a general duty imposed on all property of the deceased without regard to the question whether he has left a will or not. Then the Legislature has imposed—so to speak, as an afterthought—an additional duty called settlement estate duty, which depends upon the property being settled by will.

The incidence of the two duties is different, and in popular parlance the term "estate duty" is not used to include settlement estate duty. It cannot be said that the direction in the will is superfluous if the term "estate duty" has its proper meaning, because but for that direction the executors could have thrown a portion of the duty on the real estate.

JOYCE J. This is a question of the construction of the will. The testatrix, after devising certain real estates by her will (including the estate in question), declared that her trustees should stand possessed of her residuary personal estate upon trust for certain purposes, and amongst others to pay "the estate duty on the whole of the real and personal estate devised and bequeathed by this my will." The question is whether the estate duty spoken of in that residuary gift includes settlement estate duty as well as estate duty simply so called. Mr. Cartmell has referred me to the various sections of the Finance Act, 1894, in which it is clear, I think, that "estate duty" is a comprehensive term comprising, not only estate duty in the narrower sense, but also settlement estate duty. Mr. Parker admits that for all revenue purposes that is so; but he points out that there is a difference in the incidence and collection of settlement estate duty, and I understood him to say that in ordinary parlance settlement estate duty is not spoken of as estate duty. As I said to him in the course of the argument, that is mere assertion. I do not agree with him as to that. The words "estate duty" are used both of settlement estate

(1) [1900] 1 Ch. 565.

duty and also of the ordinary estate duty. Primâ facie I do not see why the testatrix in this will should make any difference between the two duties. The settlement estate duty is estate duty: it is estate duty under the Act and, in my opinion, it is estate duty for the purposes of this will. I think that this will must be construed in precisely the same way as if the testatrix had said, "Pay all the estate duty upon all my real and personal estate." I am of opinion that the settlement estate duty must be paid out of the residuary personalty.

Solicitors: *Mackrell, Maton, Godlee & Quincey; Treasury Solicitor.*

H. B. H.

END OF VOL. II.

The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1, 1901, will be as follows:—

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Under the modern form of a creditor's administration bond—by which the creditor administrator undertakes to pay the debts of the deceased "in a due course of administration rateably and proportionably, and according to the priority required by law, and not unduly preferring his own debt or the debts of any other of the creditors of the deceased by reason of his being an administrator as aforesaid"—he may still retain, out of moneys coming to his hands or in court in an administration action by other creditors, his own debt as against other debts of equal degree.

*Davies* v. *Parry*. [1899] 1 Ch. 602, approved. *In re* BELHAM. RICHARDES *v.* YATES - C. A. 52

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A testatrix by her will gave her residuary estate to A., who was also an executor of the will, and by a subsequent memorandum, acknowledged by A. to be a valid trust, directed that a portion of the residue should be held in trust for certain other persons. Apart from the portion bound by the memorandum, the residuary personalty was insufficient for payment of the debts of the testatrix:—

*Held*, that, although the trust was specific, it was not a specific bequest, inasmuch as the title of the cestuis que trust was dehors the will:

*Held*, therefore, that the debts were payable rateably out of the portion affected by the memorandum and the portion not so affected.

The testatrix, having a general testamentary power of appointment over a fund, appointed the fund by her will:—

*Held*, following *In re Treasure*, [1900] 2 Ch. 648, and dissenting from *In re Moore*, [1901] 1 Ch. 691, that the estate duty in respect of the fund was payable out of the fund itself. *In re* MADDOCK. LLEWELYN *v.* WASHINGTON
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There is a broad difference between removing an obstruction which has been wrongfully placed in the highway, and making good by a permanent structure the result of mere non-feasance on the part of those charged with the duty of repairing; therefore a person who is merely entitled as one of the public to use a bridge carrying the highway over a river is not justified in entering on another person's land, and re-erecting the bridge which has been allowed to fall into a state of decay. An operation of this nature cannot properly fall under the term "abatement," even if the right to "abate" can be said to exist at all, in the case of a nuisance arising from mere nonfeasance.

Where there is no obligation to repair, there can be (in the absence of special power given) no right to repair, and the default of a local authority cannot extend the burden placed upon the land, or give to other persons a right which would not have existed if the local authority had not been in default. CAMPBELL DAVYS *v.* LLOYD C. A. 518

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—— *Lucena* v. *Lucena*, (1877) 7 Ch. D. 255, 269, approved and followed - - 169
*See* WILL. 13.

—— *Lumley* v. *Wagner*, (1852) 1 D. M. & G. 604, applicable - - - - 37
*See* CONTRACT. 1.

—— *Maddison* v. *Chapman*, (1858) 4 K. & J. 708, 719, applicable - - - 794
*See* POWER OF APPOINTMENT. 2.

—— *Maddock, In re*, [1901] W. N. 118, followed 659
*See* WILL. 6.

—— *Manchester and Milford Ry. Co., In re*, (1880) 14 Ch. D. 645, explained - - 8
*See* RAILWAY.

—— *Matson* v. *Dennis*, (1864) 4 D. J. & S. 345, followed - - - - 160
*See* MORTGAGE. 1.

—— *Middleton* v. *Pollock*, (1876) 2 Ch. D. 104, referred to - - - - 231
*See* TRUSTEE. 1.

—— *Montefiore* v. *Behrens*, (1865) L. R. 1 Eq. 171, distinguished - - - 145
*See* FRAUDULENT CONVEYANCE.

—— *Moore, In re*, (1885) 54 L. J. (Ch.) 432; 33 W. R. 447, principle of, preferred to that of *In re Foster*, (1890) 45 Ch. D. 629 584
*See* SETTLEMENT. 3.

—— *Moore, In re*, [1901] 1 Ch. 691, dissented from - - - - 372, 659
*See* ADMINISTRATION. 2.
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—— *Morrison, In re*, [1901] 1 Ch. 701, considered
*See* TRUSTEE. 2. 534

—— *Morrow* v. *M'Conville*, (1883) 11 L. R. Ir. 236, principle in, followed - 110
*See* WILL. 4.

—— *New, Prance & Garrard's Trustee* v. *Hunting*, [1897] 2 Q. B. 19, affirmed *sub nom.* SHARP *v.* JACKSON, [1899] A. C. 419, referred to - - - - 231
*See* TRUSTEE. 1.

—— *Northern Counties of England Fire Insurance Co.* v. *Whipp*, (1884) 26 Ch. D. 482, discussed - - - - 231
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—— *O'Brien* v. *O'Brien*, [1896] 2 I. R. 459, not followed - - - - 169
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—— *Odessa Waterworks Co., In re*, [1897] W. N. 166, observed on - - - 184
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—— *Onley* v. *Gardiner*, (1838) 4 M. & W. 496; 51 R. R. 704, followed - - 350
*See* WAY, RIGHT OF. 3.

—— *Palmer, In re*, [1900] W. N. 9, followed 280
*See* WILL. 8.

—— *Pearson, In re* (1876) 3 Ch. D. 807, followed
*See* FRAUDULENT CONVEYANCE. 145

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—— *Penton* v. *Robart*, (1801) 2 East, 88; 6 R. R. 376, followed - - - 388
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—— *Plasterers' Co.* v. *Parish Clerks' Co.*, (1851) 6 Ex. 630, discussed - - 198
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—— *Queen's Hotel Company, Cardiff, Limited*, [1900] 1 Ch. 792, distinguished - 357
*See* COMPANY. 2.

—— *Sharp* v. *Jackson*, [1899] A. C. 419, referred to - - - - 231
*See* TRUSTEE. 1.

—— *Sichell's Case*, (1867) L. R. 3 Ch. 119, applicable - - - - 265
*See* COMPANY. 8.

—— *Smith* v. *Callander*, [1901] A. C. 297, followed - - - - 388
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—— *South* v. *Bloxam*, (1865) 2 H. & M. 457, explained - - - - 602
*See* PRINCIPAL AND SURETY.

—— *Standley's Estate, In re*, (1868) L. R. 5 Eq. 303, followed - - - 578
*See* WILL. 10.

—— *Steeds* v. *Steeds*, (1889) 22 Q. B. D. 537, explained - - - - 160
*See* MORTGAGE. 1.

—— *Taylor* v. *Blakelock*, (1886) 32 Ch. D. 560, referred to - - - - 231
*See* TRUSTEE. 1.

—— *Taylor* v. *Russell*, [1892] A. C. 244, 262, referred to - - - - 231
*See* TRUSTEE. 1.

—— *Thomas* v. *Jones*, (1860) 1 Dr. & Sm. 134, 136, applicable - - - 357
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—— *Thomson* v. *Shakespear*, (1860) 1 D. F. & J. 399, distinguished - - - 110
*See* WILL. 4.

—— *Thorndike* v. *Hunt*, (1859) 3 De G. & J. 563, referred to - - - - 231
*See* TRUSTEE. 1.

—— *Tickle* v. *Brown*, (1836) 4 Ad. & E. 369; 43 R. R. 358, discussed - - 198
*See* WAY, RIGHT OF. 1.

—— *Treasure, In re*, [1900] 2 Ch. 648, followed
*See* ADMINISTRATION. 2. 372, 659
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—— *Trevor* v. *Whitworth*, (1887) 12 App. Cas. 409, applicable - - - 265
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—— *Union Bank of London* v. *Kent*, (1888) 39 Ch. D. 238, referred to - - 231
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—— *Walsh* v. *Lonsdale*, (1882) 21 Ch. D. 9, followed - - - - 608
*See* LANDLORD AND TENANT. 1.

—— *Watts* v. *Nelson*, (1871) L. R. 6 Ch. 166, distinguished - - - - 502
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—— *Wilkinson's Trusts, In re*, (1887) 19 L. R. Ir. 531, principle in, followed - 110
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—— *Wiltshire* v. *Rabbits*, (1844) 14 Sim. 76, referred to - - - - 231
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**CERTIFICATE** — Deposit — Shares — Equitable mortgage—Pledge—Foreclosure 314
*See* COMPANY. 6.

**CHAPELRY** — Parish, Division of — Parochial chapelry or separate parish - 317
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**CHARITY**—*Annual Payment of Corn to Poor of Parish—Charge on Great Tithes—Inclosure Act—Lands allotted in lieu of Tithes—Sale of Lands—Lands subject to Charge—Mortgagee—Notice of Charge—Inclosure Act*, 1830 (11 *Geo.* 4, *c.* 4), *ss.* 37, 66—*Charitable Trusts (Recovery) Act*, 1891 (54 *&* 55 *Vict. c.* 17)—*Conveyancing Act*, 1882 (45 *&* 46 *Vict. c.* 39), *s.* 3, *sub-s.* 1 (*ii.*).

In 1881 the defendant purchased from the Ecclesiastical Commissioners certain lands which, in 1834, had been allotted to their predecessors in title under the Inclosure Act, 11 Geo. 4, c. 4, in lieu of the great tithes of the parish of H. There was evidence that from time immemorial an annual payment of a certain quantity of corn had been made out of the tithes for the benefit of the poor of the parish, and from 1834 to 1881 the same payment had been made by the owners or occupiers of the lands in question. The conveyance to the defendant was expressed to be made "free from incumbrances," but was also expressly subject to the unredeemed land tax, tithe commutation rent-charge, both rectorial and vicarial, and to all other payments and outgoings, ecclesiastical or civil, charged upon or payable out of the lands conveyed :—

*Held*, that the payment of corn constituted a valid charge to which the lands allotted in lieu of the tithes became subject by virtue of s. 66 of the Inclosure Act, and that the defendant by the terms of his conveyance took the lands subject to the charge.

The defendant had mortgaged the lands by a deed which expressly stated in terms similar to those used in the conveyance that the mortgage was subject to all payments and outgoings, ecclesiastical or civil, charged upon or payable out of the mortgaged property. The mortgagee had made no inquiry as to the existence of any charges upon the property :—

*Held*, that, having regard to s. 3, sub-s. 1 (ii.), of the Conveyancing Act, 1882, the mortgagee must be taken to have had notice of the charge in question, and that the mortgaged property was subject thereto. *In re* THE ALMS CORN CHARITY. CHARITY COMMISSIONERS *v.* BODE
Stirling J. 750

2. —— *Mortmain—"Charitable Uses"—Will—Construction—Direction to Purchase Land and Build Dwelling-houses for the Poor—Mortmain and Charitable Uses Act*, 1891 (54 *&* 55 *Vict. c.* 73), *ss.* 7, 8—*Working Classes Dwellings Act*, 1890 (53 *&* 54 *Vict. c.* 16), *s.* 1, *sub-s.* 1.

Testator bequeathed personalty to trustees upon trust to purchase land and build houses thereon, and let the same at an under-value to the poor of London and other populous places as a continuing trust :—

*Held*, that the words "charitable uses" in

**CHARITY**—*continued.*

s. 7 of the Mortmain and Charitable Uses Act, 1891, meant the same thing as "purposes of the charity"; that the charitable uses in the present case were, therefore, the continuing trust to let the houses at less than their value, not the direction to purchase land and build houses, and that that trust was not affected by s. 7, but was a valid charitable gift.

*Semble:* The Working Classes Dwellings Act, 1890, does not apply to charities. *In re* SUTTON. LEWIS *v.* SUTTON - - Buckley J. 640

3. —— *Mortmain—Real Estate—Devise—Sale—Extension of Time—Jurisdiction—Mortmain and Charitable Uses Act*, 1891 (54 *&* 55 *Vict. c.* 73), *ss.* 5, 6.

Where land has been devised to a charity, the Court has jurisdiction, under s. 5 of the Mortmain and Charitable Uses Act, 1891, when and so often as the circumstances render it desirable, to extend the time for sale beyond the year from the testator's death: and the power of granting an extension of time is not confined merely to an extension for the purpose of carrying into effect a contract for sale made within the year from the death. *In re* SIDEBOTTOM. BEELEY *v.* SIDEBOTTOM - - - - - C. A. 1

—— Corps of Commissionaires, Bequest to committee of—Voluntary association—Perpetuity - - - - 110
*See* WILL. 4.

—— Water supply—Swimming bath—School—Domestic purposes - - 813
*See* WATER.

**CHILDREN**—Illegitimate children—Class gift
*See* WILL. 9. 441

—— Illegitimate children — Gift to children nominatim — Gift to next of kin of children - - - - 578
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**CHOSE IN ACTION**—Brewer's lease—Benefit of covenant a chose in action - 608
*See* LANDLORD AND TENANT. 1.

**CIRCULARS**—Contempt of Court—Fraudulently circularising shareholders while winding-up petition pending - - 424
*See* COMPANY. 9.

**CLAM**—Enjoyment clam — Right to support of dock sides by rods fastened in adjoining owner's land—Easement - - 300
*See* SUPPORT.

**CLASS**—Gift over on death coupled with a contingency—"Die leaving issue"—Divesting—Period of defeasibility - 338
*See* WILL. 3.

—— Illegitimate children - - - 441
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**CLAY**—Mines and other minerals—Railway company—Purchase of surface - 624
*See* MINES.

**CO-DEFENDANTS** — Costs — Taxation — Judgment against one defendant - 763
*See* PRACTICE. 1.

**COLLATERAL SECURITY**—Surety—Mortgage
*See* PRINCIPAL AND SURETY. 602

**COMMISSION** — Shares, Issue of — Payment of commission for placing shares—Underwriting agreement - - 23
*See* COMPANY. 7.

**COMMISSIONAIRES** — Bequest to committee of Corps of — Voluntary association — Charity—Perpetuity - - 110
*See* WILL. 4.

**COMMON**—*Common Lands taken for Public Undertaking — Compensation for Extinguishment of Commonable Rights — Apportionment — Action to determine the Persons interested—Jurisdiction—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 102–104—*Inclosure Act*, 1854 (17 & 18 *Vict. c.* 97), *ss.* 15–17.

Under the Lands Clauses Consolidation Act, 1845, and the Inclosure Act, 1854, where common lands are taken for a public undertaking, the committee of commoners appointed to receive the compensation money payable in respect of the extinguishment of commonable rights, or, in cases of difficulty, the Board of Agriculture, as the successors of the Inclosure Commissioners, are the proper tribunal to determine who are the persons interested in such money, and what are their interests, and (in the absence of misconduct) the Court has no original power to interfere with the jurisdiction of either body.

An action against a committee of commoners by a person who claimed to be entitled as sole commoner to the whole of the compensation money in their hands dismissed for want of jurisdiction. RICHARDS *v.* DE WINTON. RICHARDS *v.* EVANS - - - - **Kekewich J. 566**

**COMPANY** — *Debenture-holders' Action — Costs—Taxation—Trustees' Costs—Same Solicitor appearing for Trustees and Company—Disallowance of Company's Costs—Right of Trustees to Full Set of Costs—Retainer—Joint or Separate.*

Where debentures are secured by a trust deed, the trustees are properly added as defendants to a debenture-holders' action, and where the trustees and the company appear by the same solicitor, although the company are not entitled to costs, all the costs of the defendants, except any separate costs of the company, ought to be paid out of the assets before distribution amongst the debenture-holders, upon the ground that, subject to that exception, those costs must be treated as incurred by the trustees; and for this purpose the order directing taxation should contain a direction that in taxing the costs of the trustees the taxing master should allow them a full set of costs, except as regards any separate costs of the company, notwithstanding that the trustees and the company have appeared by the same solicitor. MORTGAGE INSURANCE CORPORATION, LIMITED *v.* CANADIAN AGRICULTURAL, COAL AND COLONIZATION COMPANY **Kekewich J. 377**

2. —— *Debenture-holders' Action — Deficient Estate—Costs of Plaintiff—Solicitor and Client—Party and Party.*

The rule in creditors' and legatees' administration actions—that, where the estate is insufficient for payment of the debts or legacies in full, the plaintiff is entitled to his costs as between solicitor and client, and not as between party and party only—applies, upon the principle

**COMPANY**—*continued.*

stated in *Thomas* v. *Jones*, (1860) 1 Dr. & Sm. 134, 136, equally to a debenture-holders' action, where the company's assets are insufficient for payment of the debentures in full.

*In re Queen's Hotel Company, Cardiff, Limited*, [1900] 1 Ch. 792, distinguished.

Decision of Kekewich J. reversed. *In re* NEW ZEALAND MIDLAND RAILWAY COMPANY. SMITH *v.* LUBBOCK - - - - **C. A. 357**

3. —— *Memorandum of Association—Preference Shares—Alteration of Holders' Rights—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 8, 12.

The memorandum of association of a company divided its capital into preference and ordinary shares, and provided as follows: "Such preference shares shall confer a right to a fixed cumulative preferential dividend at the rate of 7*l.* per centum per annum. Any shares of the present or any increased capital of the company may be guaranteed or have any special privilege or advantage, or may be deferred, and may be issued on such special conditions as to priority or postponement, either for dividends or repayment of principal, or as to voting power, and generally in such terms as the company may from time to time determine":—

*Held*, that the company could on increasing its capital issue further preference shares ranking pari passu with the original preference shares. UNDERWOOD *v.* LONDON MUSIC HALL, LIMITED **Cozens-Hardy J. 309**

4. —— *Name of Company — Registration—Fraudulent Purpose—Trade Name—Foreign Firm—Imitation—Signatories to Memorandum—Liability—Form of Injunction.*

A foreign trader who has no English agency, but whose goods are in fact frequently imported into England, has a sufficient English market to enable him to restrain piracy of his trade name.

*Collins Co.* v. *Brown*, (1857) 3 K. & J. 423, followed.

Where a company is formed for a fraudulent purpose, the signatories to the memorandum are guilty of a fraudulent conspiracy to effect that purpose.

Where a motor-car manufacturing company was registered in a name colourably resembling that of existing motor-car manufacturers with the fraudulent intention of obtaining the benefit of their reputation in that business, the company and the signatories to the memorandum, who were the only directors and shareholders, were restrained from using the name in connection with that business, and the signatories were further restrained from allowing the company to remain registered under that name. LA SOCIÉTÉ ANONYME DES ANCIENS ÉTABLISSEMENTS PANHARD ET LEVASSOR *v.* PANHARD LEVASSOR MOTOR COMPANY, LIMITED - - **Farwell J. 513**

5. —— *Reduction of Capital — Confirmation by Court—Preference and Ordinary Shareholders—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 11—*Companies Act*, 1877 (40 & 41 *Vict. c.* 26), *s.* 3.

Decision of Cozens-Hardy J., [1900] 2 Ch. 846, dismissing a petition for the confirmation by the Court of special resolutions for the reduction of the capital of a company, affirmed, on the

**COMPANY**—*continued.*

ground that the evidence did not prove a loss of capital to the extent alleged in the resolutions.

The Court of Appeal declined to express an opinion upon any of the points of law dealt with by Cozens-Hardy J. *In re* BARROW HÆMATITE STEEL COMPANY - - - C. A. 746

6. —— *Shares—Equitable Mortgage—Pledge—Deposit of Certificate—Foreclosure.*

Where a certificate of shares is deposited as security for a debt and interest without a transfer or memorandum, the remedy of the lender against the shares is an order for transfer and foreclosure. HARROLD *v.* PLENTY - Cozens-Hardy J. 314

7. —— *Shares, Issue of—Payment of Commission for placing Shares—Underwriting Agreement—Option to Underwriters to take other Shares——Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *s.* 6.

A company, proposing to issue 80,000 unissued 1*l.* shares, offered them to the existing shareholders at the price of 2*l.* 10*s.* per share. The company also entered into an agreement with some persons who thereby agreed to underwrite or guarantee the subscription for 60,000 of the 80,000 shares at the issue price, in consideration of an option given to the underwriters to subscribe for and have allotted to them 15,000 other unissued shares of the company at the price of 2*l.* 10*s.* per share. At this time the market price of the company's shares exceeded 2*l.* 10*s.* The company's articles of association authorized the payment of commission for obtaining applications for or placing shares, but did not, as required by sub-s. 1 of s. 8 of the Companies Act, 1900, mention any amount or rate per cent. of commission:—

*Held*, that this agreement involved an application of 15,000 shares in payment of commission for subscribing or agreeing to subscribe for shares of the company, within the meaning of sub-s. 2 of s. 8, and was therefore invalid under that subsection.

An injunction was accordingly granted, at the instance of a shareholder, to restrain the company from carrying out the agreement.

Decision of Farwell J. affirmed. BURROWS *v.* MATABELE GOLD REEFS AND ESTATES COMPANY C. A. 23

8. —— *Shares, Surrender of—Ultra vires—Transaction amounting to Sale and Purchase—Release of Liability on Shares—Rectification of Register—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 35—"*Justice of the Case*"—*Lapse of Time—Restoration of Shares surrendered.*

A surrender to a limited company by shareholders of partly paid shares in the company is a transaction of purchase and sale, the company in effect purchasing the shares at the price of discharging the shareholders from their liability to calls, and such a transaction is bad under the decision in *Trevor* v. *Whitworth*, (1887) 12 App. Cas. 409.

The directors of the defendant company, in 1893, with the object of making good to the company a loss which had been incurred, surrendered to the company eighty-three shares each, the shares being 1l*l.* shares with 10*l.* only paid thereon. The articles of the company empowered

**COMPANY**—*continued.*

the directors to accept from any member the surrender of his shares or any part thereof, upon such terms as should be agreed, and resolutions of the board were passed accepting the surrenders and cancelling the certificates for the shares. The company afterwards became prosperous, and in 1900 it was suggested, at a meeting of shareholders, that the shares should be restored to the directors. An action was brought to have the surrenders declared inoperative, and the register of members rectified by inserting the names of the directors or their representatives in respect of the surrendered shares:—

*Held*, that the surrenders were bad, as being a purchase by the company of its own shares; but that the justice of the case did not require the rectification of the register after the lapse of more than seven years, and when nothing had happened in the meantime except that the company, which in 1893 had been embarrassed, had now become prosperous.

*Sichell's Case*, (1867) L. R. 3 Ch. 119, and *In re Dronfield Silkstone Coal Co.*, (1880) 17 Ch. D. 76, upon the question of rectification, applied. BELLERBY *v.* ROWLAND & MARWOOD'S STEAMSHIP COMPANY - - - Kekewich J. 265

9. —— *Winding-up — Contempt of Court — Fraudulently Circularising Shareholders while Winding-up Petition pending — Companies Act* (25 & 26 *Vict. c.* 89), *s.* 145.

When a petition is pending for the winding-up of a company, it is a contempt of Court to issue a circular to the shareholders of the company containing misrepresentations with the intent to obtain a resolution of the company for the voluntary winding-up thereof, and thereby mislead the Court as to the real view of the shareholders and prevent a compulsory winding-up order from being made. *In re* SEPTIMUS PARSONAGE & Co. Wright J. 424

10. —— *Winding-up—Meeting to Pass Resolution for Winding-up — Requisition of Shareholders—Notice issued by Secretary without Authority of Directors—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 51, 129, 145; *Sched. I., Table A, cl.* 32—*Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *s.* 13.

After a requisition for an extraordinary meeting has been deposited under s. 13 of the Companies Act, 1900, the meeting can only, within the next twenty-one days, be summoned by the directors acting together as a board, and the secretary of the company cannot on his own responsibility lawfully summon the meeting.

*In re Haycraft Gold Reduction and Mining Co.*, [1900] 2 Ch. 230, followed.

*Quære*, whether, if the twenty-one days expire without any meeting being summoned by the directors, the requisitionists can call the meeting by notices signed by the secretary.

A company was governed, so far as the calling of meetings was concerned, by Table A (in Sched. I. to the Act of 1862), clause 32 of which says that "the directors may, whenever they think fit . . . . convene an extraordinary general meeting." By the articles of association two directors constituted a quorum. A requisition was sent to the directors in accordance with s. 13 of the

Companies Act, 1900, requesting them to convene a meeting to pass an extraordinary resolution for voluntary winding-up. Within the twenty-one days allowed to the directors, by s. 13, for convening the meeting, the secretary of the company, without the authority of the directors, summoned the meeting. At the meeting two directors, the requisitionists, and many shareholders were present, and the resolution was passed by the required majority.

At the hearing of a petition by a creditor for the compulsory winding up of the company, the defence was set up that a voluntary winding-up was pending, and that the petitioner did not shew that he was thereby prejudiced :—

*Held*, that the secretary had no power to issue the notices, that there was no ratification of his act, that the so-called ratification of the company was invalid, and that a compulsory winding-up order must be made. *In re* STATE OF WYOMING SYNDICATE - - - **Wright J. 431**

11. —— *Winding-up—Preferential Payments—Debenture-holders' Action—Receiver in Possession—Poor and District Rates—Water Rate Payable by Meter—Apportionment—Preferential Payments in Bankruptcy Act*, 1888 (51 & 52 *Vict. c.* 62), *c.* 1, *sub-s.* 1 (*a*)—*Preferential Payments in Bankruptcy Amendment Act*, 1897 (60 & 61 *Vict. c.* 19), *ss.* 2, 3.

On November 9, 1898, holders of debentures of a company commenced an action to enforce their security, and a receiver was appointed. The debentures were a charge on the undertaking of the company and its property present and future. On December 1, 1898, the company went into liquidation. In January, 1899, the receiver paid poor-rate and district rate made in October, 1898, and water rate, which was payable according to meter. He claimed to be recouped these payments as preferential payments under the Preferential Payments in Bankruptcy Act, 1888, and Amendment Act, 1897 :—

*Held*, that the question being one between mortgagor and mortgagee, not between successive occupiers, and the poor-rate and district rate being due from the company at the date of the commencement of the winding-up, the liquidators must pay the whole amounts out of the general assets of the company; but that the water-rate was not due until the water was supplied, and must be apportioned, the liquidators paying only so much as was due at the date of the commencement of the winding-up. *In re* MANNESMANN TUBE COMPANY. VON SIEMENS *v.* MANNESMANN TUBE COMPANY - - **Kekewich J. 93**

12. —— *Winding-up — Surplus Assets—Preference Shares — Revenue representing Dividends never Declared—Loss of Capital.*

The memorandum of association of a company divided its capital into preference and ordinary shares, and provided that the former should confer on the holders the right to a fixed accumulative preferential dividend at the rate of 5*l.* per cent. per annum on the capital paid up thereon, "subject to the provisions of the company's articles of association." The articles of association provided (6) that the holders of the preference shares for the time being should be



entitled to a cumulative preferential dividend at the rate of 5*l.* per cent. per annum payable half-yearly on certain named days, provided that in the event of winding-up the surplus assets should be distributed between the holders of preference and ordinary shares according to the amount paid up thereon; (103) that the directors should have power to set aside out of the profits of the company or otherwise such sums as they thought proper as a reserve fund to meet contingencies, equalizing dividends, &c., and for such other purposes as the directors should in their absolute discretion think conducive to the interests of the company; (108) that profits from time to time available for dividends should, subject to the provisions thereinafter contained, be applicable first to the payment of the fixed cumulative preferential dividend on the preference shares, and that the surplus should be applicable to the payment of dividends on the ordinary shares, but that the whole or any part thereof might be carried to reserve; (110) that the company in general meeting might declare a dividend; but (111) that no larger dividend should be declared than was recommended by the directors.

All the preference and ordinary shares which were issued were fully paid up. The preferential dividend was paid up to February, 1896, only.

In March, 1899, there was a debit balance on profit and loss account of 4346*l.*, as appeared by that account and the balance-sheet of that date (the last of the accounts and balance-sheets made out before the winding-up of the company commenced).

In July, 1900, the company passed resolutions —(*a*) sanctioning an agreement for the sale to another company of all the company's assets except any "undivided net profits of the business of the vendor company appearing in the balance-sheet for the year ending March 31, 1900," which was to be settled and audited by the auditors of the vendor company on the same basis as the previous balance-sheets; (*b*) for the voluntary winding-up of the company.

On August 7, 1900, the auditors certified a profit and loss account and balance-sheet shewing a profit of 1675*l.* on the trading for the year ending March 31, 1900, and on the following day resolution (*b*) was confirmed as a special resolution.

The amount produced by the sale was insufficient to repay to the shareholders the amount of capital paid up on the shares. The preference shareholders claimed that the 1675*l.* should be utilized in paying a dividend on their shares as from February, 1896. The ordinary shareholders contended that the amount must be applied towards repaying the holders of preference and ordinary shares the capital paid up thereon :—

*Held*, (1) that there was no rule of law that profit on one year's trading could not be divided merely because on the profit and loss account there was a debit balance on the trading of former years; but (2) that it was not sufficient to support the claim of the preference shareholders to shew that the profit might have been made available for dividend by some action of the directors, and that, as it had not been shewn that the profit had actu-

**COMPANY**—*continued.*
ally been made so available, the claim of the preference shareholders failed.

Observations on *In re Odessa Waterworks Co.*, [1897] W. N. 166 (more fully reported in a note to this report, [1901] 2 Ch. 190). *In re* CRICHTON'S OIL COMPANY - - - Wright J. 184

13. —— *Winding-up—Surplus Assets — Preference Shares—Revenue representing Dividends never Declared.*

*In re* ODESSA WATERWORKS COMPANY
Byrne J. 190, n.

14. —— *Winding-up (Voluntary)—Remuneration of Liquidator—Charges for Letters.*

A company which was being wound up under a compulsory winding-up order was liable for the costs and expenses of the voluntary winding-up of other companies, the undertakings of which it had purchased.

In assessing the amount payable as remuneration to the voluntary liquidator:—

*Held*, (1) that the Court would not sanction an alleged practice of accountants to charge for all letters written, irrespective of their character, as having taken half an hour of the principal's time (charged for at a certain rate) in the preparation; (2) that there was nothing to bind the Court to apply the scale adopted by the Chancery judges and sanctioned by the Lord Chancellor in 1868, and which only applied to official liquidators; and (3) that each case as to the remuneration of a voluntary liquidator must be considered with regard to its own particular circumstances. *In re* AMALGAMATED SYNDICATES, LIMITED
Wright J. 181

—— Debenture trust deed—Receiver, Use or occupation by — Head-lease — Rent — Breach of covenant - - 721
*See* MORTGAGE. 2.

—— Reconstruction — Trust estate — Management—Powers—Investment - 534
*See* TRUSTEE. 2.

—— Trust estate — Management — Concurrence of trustees — Powers — Company — Reconstruction - - - 534
*See* TRUSTEE. 2.

**COMPENSATION**—Contract—Enjoyment of light —Deed of acknowledgment—Non-disclosure—Specific performance—Costs
*See* VENDOR AND PURCHASER. 1. 324

—— Extinguishment of commonable rights—Apportionment - - - 566
*See* COMMON.

—— Glass-houses—Removable fixtures — Fruit trees - - - - - 388
*See* LANDLORD AND TENANT. 2.

—— Sale by the Court—Conditions of sale—Mistake—Misdescription - - 98
*See* VENDOR AND PURCHASER. 6.

**CONDITIONS OF SALE**—Mistake—Sale by the Court—Misdescription—Compensation
*See* VENDOR AND PURCHASER. 6. 98

**CONTEMPT OF COURT** — Company — Fraudulently circularising shareholders while winding-up petition pending - 424
*See* COMPANY. 9.

**CONTINGENCY** — Class — Gift over on death coupled with a contingency — "Die leaving issue"—Divesting—Period of defeasibility - - - 338
*See* WILL. 3.

**CONTINGENT INTEREST**—Accumulation 134
*See* WILL. 5.

**CONTRACT**—*Illegality—Remoteness—Uncertainty —Statutory Confirmation—Pre-emption, Right of —Contract to give "First Refusal" of Land—Negative Contract—Interest in Land—Purchaser with Notice—Injunction.*

An agreement scheduled to an Act of Parliament was thereby "confirmed and declared to be valid and binding upon the parties thereto":—

*Held*, that every clause of the agreement had statutory validity, so that no objection could be taken on the ground of remoteness or uncertainty.

An agreement between a racecourse company and a canal company contained a clause that if the racecourse should be at any time proposed to be used for dock purposes, the racecourse company should give the canal company the "first refusal" thereof:—

*Held*, that "first refusal" imported either a fair and reasonable offer to sell to the canal company, or that the price at which the racecourse company were to give the canal company the "first refusal" was a price which the racecourse company would accept from other would-be buyers in the event of the refusal of the canal company to buy at that price: i.e., that the canal company had a "right of pre-emption"; and that an offer to the canal company at an extravagant price which the racecourse company did not reasonably expect would be given either by the canal company or any other would-be buyer was not giving a "first refusal" within the meaning of the clause:

*Held*, also, that the clause did not create an interest in land so as to entitle the canal company on that ground to enforce their right of pre-emption as against an intending purchaser with notice of the right; but that the canal company were entitled to enforce their right as against the racecourse company and the intending purchaser, on the ground that the contract to give the canal company the "first refusal" involved a negative contract not to part with the racecourse to any one else without giving them that "first refusal": *Lumley* v. *Wagner*, (1852) 1 D. M. & G. 604.

Appeal from Farwell J., [1900] 2 Ch. 352, dismissed with costs. MANCHESTER SHIP CANAL COMPANY *v.* MANCHESTER RACECOURSE COMPANY
C. A. 37

2. —— *Validity—Restraint of Trade—Sale to Wholesale Trader on Contract requiring him to resell on Specified Terms.*

The plaintiffs, who were manufacturers of goods, sold them to wholesale traders under a contract whereby the purchasers bound themselves not to sell the goods for less than certain specified prices, and if they sold to the trade to procure a similar signed agreement from every retailer whom they supplied. The purchasers sold some of the goods to retail traders without

**CONTRACT**—*continued.*
procuring from them any such agreement as provided by the contract:—
*Held*, that the contract was not in restraint of trade, and that the vendors could maintain an action in respect of the breach of it. ELLIMAN, SONS & Co. *v.* CARRINGTON & SON, LIMITED Kekewich J. 275

—— Electric energy—Implied contract not to take it from anybody else—Injunction *See* ELECTRIC LIGHTING. 799

—— Leaseholds—Onerous covenants—Duty of vendor to disclose—Rescission - 666 *See* VENDOR AND PURCHASER. 3.

—— Light, Enjoyment of—Deed of Acknowledgment — Non-disclosure — Specific Performance—Compensation—Costs 324 *See* VENDOR AND PURCHASER. 1.

—— Rescission—Return of deposit—Jurisdiction —Vendor's summons - - 383 *See* VENDOR AND PURCHASER. 8.

—— Tradesman and customer—Implied agreement by customer to pay interest 548 *See* INTEREST.

—— Voidable contract—Assignment of contract —Money had and received - 594 *See* VENDOR AND PURCHASER. 5.

**CONVERSION**—Timber — Lunacy—Administration - - - - - 498 *See* SETTLED LAND. 2.

**CONVEYANCE**—Covenant for title — Breach — Measure of damages - - 825 *See* VENDOR AND PURCHASER. 2.

**CONVEYANCING AND LAW OF PROPERTY**—Brewer's lease—Covenant to buy beer of lessors and "their successors in business" — Covenant running with the land - - - - - 608 *See* LANDLORD AND TENANT. 1.

—— Conveyance—Covenant for title—Breach—Measure of damages - - 825 *See* VENDOR AND PURCHASER. 2.

—— Married woman—Power of appointment—Restraint on Anticipation—Release of power - - - - - 82 *See* HUSBAND AND WIFE. 1.

—— Married woman—Removal of restraint on anticipation—Summons—Petition 221 *See* HUSBAND AND WIFE. 2.

—— Mortgage—Notice of charge—Annual payment of corn to poor of parish - 750 *See* CHARITY. 1.

—— Notice—Purchaser for value—Appropriation—Mortgage—Priority - 231 *See* TRUSTEE. 1.

—— Precarious easement—Implied grant 502 *See* WATERCOURSE.

**COPYRIGHT**—*Infringement—Work of Art—Picture—Penalty—"Every such Offence"—Minimum Amount—Known Coin of the Realm—Fine Arts Copyright Act*, 1862 (25 & 26 *Vict. c.* 68), *s.* 6.
The making or circulating of every unauthorized copy of a picture of which copyright has been acquired under the Fine Arts Copyright

**COPYRIGHT**—*continued.*
Act, 1862, is a separate offence in respect of which a penalty is incurred under s. 6 of the Act.
*Ex parte Beal*, (1868) L. R. 3 Q. B. 387, approved and followed.
But, when an action is brought to recover penalties in respect of a number of such offences, the Court is not bound to award for each offence a penalty of at least one farthing, but may award for all the offences a lump sum, which, if divided by the number of offences, will give for each a fraction less than the least recognised coin of the realm.
*Green* v. *Irish Independent Co.*, [1899] 1 I. R. 386, disapproved.
Decision of Kekewich J. (founded on that case) reversed. HILDESHEIMER *v.* W. & F. FAULKNER, LIMITED - - - C. A. 552

**CORPORATE CREDITOR**—Grant of Administration to officer—Retainer - - 399 *See* ADMINISTRATION. 3.

**CORPORATION** — *Rector — Corporation Sole — Power to hold Personalty—Mortmain—Irregular Investment in Land—Statute* 13 *Eliz. c.* 10, *s.* 3—*Trust—Notice.*
By statute 31 Geo. 2, c. 2 (private), South Sea Annuities were vested in a rector and his successors as endowment, subject to a provision for sale and reinvestment in land with the consent of the bishop.
Under statute 16 & 17 Vict. c. 23, the annuities were redeemed and the redemption money paid to the then rector on his sole receipt.
A successor having received the redemption money, acting without the consent of the bishop, invested part in land which was conveyed to himself, his heirs and assigns. He resigned and conveyed the land to the next successor, his heirs and assigns. That successor, with his concurrence, sold and conveyed part of the land to the defendant; he subsequently misappropriated the proceeds. The solicitor acting for both parties believed that the land was "church property."
In an action by the present rector against the purchaser:—
*Held*, that:—
(1.) The South Sea Stock being, by the private Act, exceptionally vested in the rector for the time being as a corporation sole, he could, on its conversion, receive and give a good discharge for the money representing it.
(2.) The purchase of the land did not purport to be and was not under the Act, and did not create any trust for the rector as a corporation sole.
(3.) The land was not subject to 13 Eliz. c. 10, and the conveyance to the defendant's vendor was not void under that Act, and was not a breach of trust, there being no beneficiary who could elect to take the land in specie.
(4.) The purchase-money having come to the proper hands, the defendant was not answerable for the subsequent misappropriation of it by his vendor, assuming (which was not decided) that the defendant was not a purchaser for valuer without notice. POWER *v.* BANKS
Cozens-Hardy J. 487

**CORPS OF COMMISSIONAIRES**—Bequest to committee of corps of—Voluntary association—Charity—Perpetuity - 110
*See* WILL. 4.

**COSTS** — Contract — Enjoyment of light — Deed of acknowledgment — Non-disclosure — Specific performance—Compensation
*See* VENDOR AND PURCHASER. 1. 324

—— Debenture-holders' action—Deficient estate —Costs of plaintiff - - - 357
*See* COMPANY. 2.

—— Debenture-holders' action—Trustees' costs —Same solicitor appearing for trustees and company - - - 377
*See* COMPANY. 1.

—— Equitable set-off—Debts "en autre droit"
*See* VENDOR AND PURCHASER. 4. 773

—— Taxation — Co-defendants — Judgment against one defendant - - 763
*See* PRACTICE. 1.

—— Taxation—Party and party—Special fee to counsel—Disallowance - - 176
*See* PRACTICE. 3.

**COVENANT**—Breach of—Receiver, Use or occupation by—Head-lease—Rent—Breach of covenant—Damages - - 721
*See* MORTGAGE. 2.

—— Brewer's lease—Covenant to buy beer of lessors and "their successors in business"—Covenant running with the land
*See* LANDLORD AND TENANT. 1. 608

—— For title—Breach—Measure of damages—Conveyance - - - - 825
*See* VENDOR AND PURCHASER. 2.

—— Leaseholds—Onerous covenants—Duty of vendor to disclose—Rescission - 666
*See* VENDOR AND PURCHASER. 3.

—— To settle after-acquired property—Reversionary interests - - 779, 820
*See* SETTLEMENT. 1, 2.

**CREDITOR** — Administrator — Retainer — "Not unduly preferring" - - 52
*See* ADMINISTRATION. 1.

—— Corporate creditor—Grant of administration to officer—Retainer - - 399
*See* ADMINISTRATION. 3.

—— Judgment creditor — Receiver — Appointment—Jurisdiction—Railway not open for public traffic - - - 8
*See* RAILWAY.

**DAMAGES**—Measure of—Conveyance—Covenant for title—Breach - - - 825
*See* VENDOR AND PURCHASER. 2.

**DEATH**—Maintenance and education—Annuity to widow for benefit of infants—Trustee —Death of widow—Annuity continued
*See* WILL. 12. 438

**DEBENTURE**—Debenture-holders' action—Costs
*See* COMPANY. 1, 2. 357, 377

—— Trustee Mortgagees—Receiver, Use or occupation by—Head-lease—Rent—Breach of covenant - - - - 721
*See* MORTGAGE. 2.

**DEBTS**—Costs—Equitable set-off—Debts "en autre droit" - - - 773
*See* VENDOR AND PURCHASER. 4.

—— Land — Administration — Liability of personal representatives for unknown debts
*See* LAND TRANSFER. 463

**DEDICATION** — Public footway — Private carriage-way along the same line—Presumption - - - - 647
*See* WAY, RIGHT OF. 2.

**DEPOSIT**—Certificate—Shares—Equitable mortgage—Pledge—Foreclosure - 314
*See* COMPANY. 6.

—— Return of—Vendor's summons—Rescission of contract—Jurisdiction - - 383
*See* VENDOR AND PURCHASER. 8.

**DIRECTOR** — Meeting to pass resolution for winding-up—Notice issued by secretary without authority of directors - 431
*See* COMPANY. 10.

**DISENTAILING ASSURANCE** — Of money not yet ascertained—Real estate limited in strict settlement - - - 290
*See* FINES AND RECOVERIES. 2.

**DISENTAILING DEED**—Estates "in defeasance of" estate tail - - - 479
*See* FINES AND RECOVERIES. 1.

**DISTRESS**—Loss of remedy by—Receiver, Use or occupation by—Head-lease—Rent—Breach of covenant—Damages - 721
*See* MORTGAGE. 2.

**DIVESTING**—Class—Gift over on death coupled with a contingency—"Die leaving issue" —Period of defeasibility - - 338
*See* WILL. 3.

**DIVIDEND**—Surplus assets—Preference shares —Revenue representing dividends never declared - - - 184, 190, n.
*See* COMPANY. 12, 13.

**DOCK** — Support — Enjoyment clam — Right to support of dock sides by rods fastened in adjoining owner's land—Easement
*See* SUPPORT. 300

**"DRAIN"**—"Building"—Semi-detached houses
*See* SEWERS. 2. 126

**DRAIN**—Surface drain—Nuisance by sewage—Drainage of houses — Notice to local authority - - - - 451
*See* SEWERS. 3.

**DUTY.**
*See* REVENUE.

**EASEMENT** — Light, Enjoyment of — Deed of acknowledgment — Non-disclosure — Contract—Specific performance—Costs
*See* VENDOR AND PURCHASER. 1. 324

—— Precarious easement—Implied grant—Artificial channel — Temporary purpose — Severance of tenements - - 502
*See* WATERCOURSE.

—— Support—Enjoyment clam—Right to support of dock sides by rods fastened in adjoining owner's land—Easement 300
*See* SUPPORT.

**EASEMENT**—*continued.*
—— Way—Prescription.
*See* Cases under WAY, RIGHT OF

**ECCLESIASTICAL LAW** — Chapelry — Parish, Division of — Parochial chapelry or separate parish - - - 317
*See* PARISH.

—— Corporation sole—Rector—Power to hold personalty — Mortmain — Irregular Investment in land - - - 487
*See* CORPORATION.

**ELECTRIC LIGHTING**—*Injunction—Contract—Electric Energy—Agreement to take the Whole from the Plaintiffs—Implied Contract not to take it from anybody else—Undue Preference—"Similar Circumstances" — Electric Lighting Act*, 1882 (45 & 46 *Vict. c.* 56), *ss.* 19, 20—*Electric Lighting Orders Confirmation (No.* 5) *Act*, 1889 (52 & 53 *Vict. c. clxxxi.*), (*Mid-London*), *ss.* 46, 47, 52.

The defendant signed a form of request to the plaintiff company to supply him with electric energy subject to (inter alia) the following terms: (1) the consumer agrees to take the whole of the electric energy required for the premises mentioned below from the company for a period of not less than five years; (2) the charge for electric energy to be 4½*d.* per Board of Trade unit. There was no covenant by the company to supply, nor by the defendant to take, any energy. Similar forms of request had been signed by other persons for different terms of years and at different prices:—

*Held*, that the request was in substance a contract not to take energy from any other person, and that it could be enforced by injunction; that under the Electric Lighting Orders Confirmation (No. 5) Act of 1889, ss. 46 and 52, the contract was valid so far as it created rights between the parties for a term of years; that the words "is entitled" in the last part of s. 19 of the Electric Lighting Act, 1882, meant entitled by agreement with the undertakers; that in making such agreements the undertakers might have regard to "special circumstances" as mentioned in s. 19, e.g., the amount of energy consumed, the expense of supplying it and getting payment, uniformity of demand, and the fact that some consumers required the energy by day and some by night; that unless all the circumstances were similar, agreements might therefore be made for different terms and at different rates; and that in this case there had been no undue preference. METROPOLITAN ELECTRIC SUPPLY COMPANY *v.* GINDER - - **Buckley J. 799**

**"EN AUTRE DROIT"**—Costs—Equitable set-off —Debts "en autre droit" - - 773
*See* VENDOR AND PURCHASER. 4.

**EQUITABLE MORTGAGE** — Shares — Pledge — Deposit of certificate—Foreclosure 314
*See* COMPANY. 6.

**EQUITABLE SET-OFF**—Costs—Debts "en autre droit" - - - - 773
*See* VENDOR AND PURCHASER. 4.

**ESTATE DUTY**—Incidence—Exercise of general power of appointment by will — Appointed fund—Residue - - 659
*See* WILL. 6.

**ESTATE DUTY**—*continued.*
—— Incidence—Will exercising power of appointment—Appointed fund—Residue 372
*See* ADMINISTRATION. 2.
—— Settlement estate duty—Direction to pay estate duty out of residuary personalty
*See* WILL. 7. 830
—— "Testamentary expenses" — Estate duty payable in respect of real estate - 280
*See* WILL. 8.

**ESTATE TAIL**—Disentailing deed—Estates "in defeasance of" estate tail - 479
*See* FINES AND RECOVERIES. 1.

**EVIDENCE**—Way—Forty years' user—Annual payment—Parol agreement—Inference from facts - - - - 198
*See* WAY. 1.

**EXECUTION** — Limited power — Testamentary appointment—Incomplete disposition—Intention - - - - 794
*See* POWER OF APPOINTMENT. 2.
—— Power—Document "purporting" to be a will - - - - - 86
*See* POWER OF APPOINTMENT. 1.
—— Power non-existent at date of will—Exercising power by anticipation—Intention
*See* POWER OF APPOINTMENT. 3. 529

**FINANCE ACT**—Estate duty—Incidence—Will —Appointed fund—Residue - 659
*See* WILL. 6.
—— Estate duty payable in respect of real estate—"Testamentary expenses" 280
*See* WILL. 8.

**FINE ARTS COPYRIGHT** — Infringement — Picture — Penalty — "Every such offence"—Minimum amount - 552
*See* COPYRIGHT.

**FINES AND RECOVERIES**—*Estate Tail—Will —Limitations of Real Estate—Disentailing Deed —Estates "in defeasance of" Estate Tail—Fines and Recoveries Act*, 1833 (3 & 4 *Will.* 4, *c.* 74), *s.* 15—*Future Rights—Unascertained Persons—Representation—Trustees.*

A testator devised and bequeathed his real and personal estate unto and to the use of trustees, upon trusts for the benefit of his wife for life; from and after her death, the surplus rents were to be accumulated for the purpose of paying off mortgages on the real estates; and upon the expiration or other determination of the period of accumulation, but subject to the life interest of the wife, the trustees were directed to convey the real estates to the use of G. in tail male; but if G. should be then dead, to the use of the person who should then be the first heir male of the body of G., with remainder to the use of the person who for the time being should be entitled to the dignity and title of Earl of Cardigan in tail male, with remainder to the use of the testator's right heirs. By a codicil the testator revoked the devise of the estate tail to G., and devised the said estates, after the death of his wife, to R. in tail male, "with all the limitations as in my said will mentioned." R., with the consent of the wife, as

**FINES AND RECOVERIES**—*continued.*
protector of the settlement, had executed a disentailing deed of 100,000*l.* Consols in court, representing proceeds of sale of the settled estates, and the trust for accumulations having now come to an end by the payment off of all the mortgages, R. claimed to be absolutely entitled to this fund, subject to the wife's life interest. On a petition for payment out of this fund by the wife and her incumbrancers with the consent of R.:—

*Held*, that as the petitioners and R. together were claiming immediate relief, on the ground that between them they were now absolutely entitled to this 100,000*l.* Consols, the question was ripe for decision, and the Court had jurisdiction to decide it; and that all necessarily unascertained persons were sufficiently represented by the trustees of the will:

*Held*, also, on the question of construction, that R. was now entitled to a vested equitable estate in tail male in remainder expectant upon the decease of the testator's wife, and that the subsequent estates had been barred by the disentailing deed, being estates to take effect in a certain event after, if not in defeasance of, the vested estate in tail male of R., and that the 100,000*l.* Consols in court could be paid out to the petitioners. LADY CARDIGAN *v.* CURZON HOWE - - - - **Byrne J. 479**

2. —— *Real Estate limited in Strict Settlement —Income of Personal Estate to be Paid to A. for Life—On Death of A. Capital to be Invested in Land to be held to the Uses of the Settlement—Disentailing Assurance of Money not yet Ascertained —Fines and Recoveries Act*, 1883 (3 & 4 *Will.* 4, *c.* 74), *ss.* 1, 71.

Personal estate the income of which is directed to be paid to A. for life, and the capital of which is on his death directed to be invested in the purchase of land to be settled to the uses of a strict settlement of real estate created by the same instrument, can be effectually disentailed in the lifetime of A. by the tenant in tail under the settlement with the consent of the tenant for life under the settlement.

*Fordham* v. *Fordham*, (1864) 34 Beav. 59, discussed and followed. *In re* HARVEY. HARVEY *v.* HARVEY - - - - **Byrne J. 290**

**FISHERY** — *Several Fishery — Crown Grant — Non-tidal, Non-navigable, Waters—Ownership of Soil — Presumption—"Weirs"—Adverse Acts of Ownership—Right of Way—Incorporeal Hereditament—Incorporeal Right.*

A several fishery may exist either apart from or as incident to the ownership of the soil over which the river flows; but where a several fishery is proved to exist, the owner of the fishery is to be presumed, in the absence of evidence to the contrary, to be the owner of the soil, whether it is a navigable river or a river neither public nor navigable. The use of the word "several" or "separalis piscaria" is not necessary to create a several fishery.

The grant of "weirs" is a grant, not of a mere right of fishing, but of a corporeal hereditament consisting not only of the soil on which any particular weir is constructed, but of the soil over which the river runs, and upon which

**FISHERY**—*continued.*
there is the right to construct weirs for the purpose of taking fish. A grant purporting to give a definite length of several fishery may still be a good grant of a several fishery in part of the river so included, though as to other part of it the Crown, at the time, had no several fishery to give.

Construction to be placed on apparently adverse acts of ownership discussed.

*Semble*, an incorporeal right of way along both banks of a river may be appendant to an incorporeal right of fishing, the one being capable of union with the other without any incongruity.

Co. Litt. 121 b considered and explained, and note (7) (Hargrave and Butler's edition) on this point adopted. HANBURY *v.* JENKINS **Buckley J. 401**

**FIXTURES** — Glass-houses — Right to remove fruit trees—Compensation - **388**
*See* LANDLORD AND TENANT. 2.

**FOOTWAY** — Private carriage-way along the same line—Presumption—Dedication
*See* WAY, RIGHT OF. 2. **647**

**FORECLOSURE**—Shares—Equitable mortgage—Pledge—Deposit of certificate - **314**
*See* COMPANY. 6.

**FOREIGN FIRM**—Name of company—Registration—Fraudulent purpose—Trade name —Form of injunction - - **513**
*See* COMPANY. 4.

**FRAUD**—Breach of trust — Solicitor trustee — Appropriation—Mortgage—Priority **231**
*See* TRUSTEE. 1.

—— Contempt of Court—Fraudulently circularising shareholders while winding-up petition pending - - - **424**
*See* COMPANY. 9.

—— Name of company—Registration—Fraudulent purpose—Trade name - **513**
*See* COMPANY. 4.

**FRAUDS, STATUTE OF** — Fraudulent conveyances - - - - **145**
*See* FRAUDULENT CONVEYANCE.

**FRAUDULENT CONVEYANCE** — *Protection of Creditors — Post-nuptial Settlement — Recital of Ante-nuptial Agreement—Wife's Chose in Action —Husband's Interest determinable on Bankruptcy —Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 4—13 *Eliz. c.* 5.

An ante-nuptial agreement made upon consideration of marriage cannot support a post-nuptial settlement unless the agreement, or a memorandum or note thereof, is signed before the marriage, pursuant to s. 4 of the Statute of Frauds. The mere recital of such an ante-nuptial agreement in the post-nuptial settlement, even if sufficiently precise to bind the settlor and volunteers claiming under him by estoppel, does not bind creditors.

By a post-nuptial settlement dated February 8, 1873, reciting that previously to the marriage the husband agreed to make such settlement of his wife's fortune as was thereinafter contained, the husband, being entitled in the right of his wife, then an infant, to a

**FRAUDULENT CONVEYANCE**—*continued.*
reversionary interest in personalty, subject to the contingency of his predeceasing her without reducing it into possession, covenanted that on the fund falling into possession he and his wife would assign it to the trustees on the usual trusts for the wife, husband, and issue of the marriage, the husband's life interest being made determinable on bankruptcy. The wife died before the fund fell into possession, so that she never became entitled to assert her equity to a settlement:—

*Held*, that, as against the husband's trustee in bankruptcy, the settlement was void in toto under the statute of 13 Eliz. c. 5.

*In re Pearson*, (1876) 3 Ch. D. 807, followed.

*Montefiore* v. *Behrens*, (1865) L. R. 1 Eq. 171, distinguished. *In re* HOLLAND. GREGG *v.* HOLLAND - - - Farwell J. 145

**FRIENDLY SOCIETY** — *Policy not Assignable otherwise than by way of Nomination—Friendly Societies Act*, 1875 (38 & 39 *Vict. c.* 60), *s.* 15—*Friendly Societies Act*, 1896 (59 & 60 *Vict. c.* 25), *ss.* 56, 57.

Policies effected under the Friendly Societies Acts, 1875 and 1896, are not assignable otherwise than by nomination under the Acts.

So *held*, following decision of Phillimore J. in *Caddick* v. *Highton*, (1899) 68 L. J. (Q.B.), 281; 80 L. T. 527; 47 W. R. 668; 15 Times L. R. 182 (see [1901] 2 Ch. 476, n.). *In re* REDMAN. WARTON *v.* REDMAN Kekewich J. 471

2. —— *Policy of Life Insurance* — "*Legal Nominee*"—*Friendly Societies Act*, 1875 (38 & 39 *Vict. c.* 60), *s.* 15—*Friendly Societies Act*, 1896 (59 & 60 *Vict. c.* 25), *s.* 56.
CADDICK *v.* HIGHTON Phillimore J. 476, n.

**FRUIT TREES**—Right to remove — Compensation - - - - - 388
*See* LANDLORD AND TENANT. 2.

**GARDENER**—Market gardeners' compensation—Glass-houses—Fruit trees - 388
*See* LANDLORD AND TENANT. 2.

**GLASS-HOUSES**—Removable fixtures—Compensation - - - - 388
*See* LANDLORD AND TENANT. 2.

**GRANT**—Implied grant—Precarious easement
*See* WATERCOURSE. 502

—— Lost Grant — Prescription — Evidence — Inference from facts - - 198
*See* WAY. 1.

**GRANT OF ADMINISTRATION** — To officer—Corporate creditor—Retainer - 399
*See* ADMINISTRATION. 3.

**HIGHWAY** — *Obstruction on Highway—Lamp-post—Interference with Trade—Adjoining Owner—Public or Private Nuisance—Individual Interest in Public Right—Local Authority—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 130.

An owner of premises abutting on a highway enjoys as a private right the right of access from his own premises to the highway, and any interference with that access is an interference with a

**HIGHWAY**—*continued.*
private right. But his right to transfer goods from vans in the public roadway across the public pavement to his premises is a right enjoyed by him as one of the public entitled to use the highway. It is an individual interest in a public right, but is not a private right which entitles him to restrain a local authority, acting bonâ fide under statutory powers, from obstructing the highway adjoining his premises in a manner which affects his personal convenience.
W. H. CHAPLIN & CO. *v.* WESTMINSTER CORPORATION - - - - Buckley J. 329

—— Bridge—Liability—Right to repair—Right to abate nuisance—Trespass - 518
*See* BRIDGE.

**HUSBAND AND WIFE** — *Married Woman — Power of Appointment—Restraint on Anticipation—Release of Power—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 52.

A married woman had, under a settlement executed on her marriage in 1872, a life interest in personalty, subject to a restraint on anticipation, with a power of appointment amongst her children:—

*Held*, that under s. 52 of the Conveyancing and Law of Property Act, 1881, she could by deed unacknowledged release her power. *In re* CHISHOLM'S SETTLEMENT. *In re* HEMPHILL'S SETTLEMENT. HEMPHILL *v.* HEMPHILL Stirling J. 82

2. —— *Married Woman—Restraint on Anticipation, Removal of—Increase of Income—Court Investments—Absolute Interest subject to Restraint—*"*Benefit*"*—Practice—Application for removal of Restraint—Summons—Petition—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 39, *sub-s.* 1.

A married woman entitled absolutely, subject only to a restraint on anticipation of the income during coverture, to the capital of a fund in court standing to her separate account and invested in Court securities, applied, under s. 39 of the Conveyancing and Law of Property Act, 1881, for the removal of the restraint in order that the fund might be paid out to the trustees of her marriage settlement with a view to reinvestment under the wide investment clause therein contained, so as to give her an increased income, the settlement trusts being for herself and her husband successively for life (subject, as to her life interest, to a restraint on anticipation during coverture), with ultimate trusts, in events which had happened, for her sole benefit:—

*Held*, by the Court of Appeal, affirming Farwell J., that mere increase of income was not a sufficient "benefit" to the married woman to justify the Court in removing the restraint so as to enable her to effect a change of investment from Court securities into others of a speculative nature, even though sanctioned by the settlement; and the application was therefore refused.

*Semble*, a married woman's restraint on anticipation may be removed under s. 39 of the Conveyancing and Law of Property Act, 1881, on petition; it is not obligatory to proceed by summons under s. 69, sub-s. 3. *In re* BLUNDELL C. A. 221

**HUSBAND AND WIFE**—*continued.*
—— Marriage settlements - - 779, 820
*See* SETTLEMENT. 1, 2.

**ILLEGITIMATE CHILDREN**—Class gift 441
*See* WILL. 9.
—— Gift to children nominatim—Gift to next of kin of children - - - 578
*See* WILL. 10.

**IMITATION**—Name of company—Registration—Fraudulent purpose — Trade name — Injunction - - - - 513
*See* COMPANY. 4.

**INCLOSURE**—Compensation for extinguishment of commonable rights—Apportionment
*See* COMMON. 566
—— Mortgagee — Notice of charge — Annual payment of corn to poor of parish 750
*See* CHARITY. 1.

**INCUMBRANCES** — General inquiry as to — Liability of vendor to answer . - 231
*See* TRUSTEE. 1.

**INDEMNITY** — Partnership — Sale of share—Vendor's right to indemnity - 620
*See* PARTNERSHIP. 2.

**INFANT**—Maintenance and education—Annuity to widow for benefit of infants—Trustee—Death of widow—Annuity continued
*See* WILL. 12. 438

**INFRINGEMENT** — Picture— Penalty—"Every such offence"—Minimum amount 552
*See* COPYRIGHT.

**INJUNCTION**—Brewer's lease—Breach of covenant—Injunction at suit of assignee 608
*See* LANDLORD AND TENANT. 1.
—— Contract to give "first refusal" of land—Negative contract — Purchaser with notice - - - - 37
*See* CONTRACT. 1.
—— Electric energy—Implied contract not to take it from anybody else - 799
*See* ELECTRIC LIGHTING.
—— Name of company—Registration—Fraudulent purpose—Trade name - 513
*See* COMPANY. 4.
—— Public footway—Private carriage-way along the same line—Presumption—Dedication
*See* WAY, RIGHT OF. 2. 647

**INN**—Brewer's lease—Covenant to buy beer of lessors and "their successors in business"—Covenant running with the land 608
*See* LANDLORD AND TENANT. 1.

**INSPECTION**—Books and accounts—Right of partner to inspect—Inspection by agent
*See* PARTNERSHIP. 1. 59

**INSURANCE, LIFE** — Policy not assignable otherwise than by way of nomination 471, 476, n.
*See* FRIENDLY SOCIETY. 1, 2.

**INTEREST**—*Tradesman and Customer—Implied Agreement by Customer to pay Interest.*

During a series of years a tradesman, in the yearly accounts which he delivered to his customer, charged him with interest on amounts which had been due for three years and longer. The customer never objected to the charge for interest, and he from time to time made payments to the tradesman on account generally. At the time of the customer's death a large amount was due from him to the tradesman for goods supplied:—

*Held*, that an agreement on the part of the customer to pay interest ought to be inferred from the course of dealing, and that the tradesman was entitled to prove in the administration of the customer's estate for interest as it had been charged, as well as for principal.

Decision of Cozens-Hardy J. (which was founded on *In re Lloyd Edwards*, (1891) 61 L. J. (Ch.) 22) reversed. *In re* HENRY, MARQUIS OF ANGLESEY. WILLMOT *v.* GARDNER C. A. 548

**INTERPRETATION ACT**—Direction to accumulate—Purchase of real estate—"For the purchase of land only" - - 285
*See* WILL. 1.

**INTERRUPTION** —Way—User—Acquisition of right against reversioner - - 350
*See* WAY, RIGHT OF. 3.

**INTESTACY**—"Survivor"—Construction of will
*See* WILL. 14. 136

**INVESTMENT** — Corporation sole — Rector—Power to hold personalty—Mortmain—Irregular investment in land - 487
*See* CORPORATION.
—— Mortgage—Inquiry into title and value—Tenant for life—Trustees for purposes of Act - - - - 790
*See* SETTLED LAND. 1.
—— Tenant for life and remainderman—Proceeds of realization of insufficient security—Apportionment - - 584
*See* SETTLEMENT. 3.
—— Trustees, Concurrence of—Management—Business—Company—Reconstruction
*See* TRUSTEE. 2. 534

**ISSUE**—Class—Gift over on death coupled with a contingency—"Die leaving issue"—Divesting—Period of defeasibility 338
*See* WILL. 3.

**JOINT ACCOUNT**—Payment to one mortgagee—Partnership—Separate debts—Payment to firm - - - - 160
*See* MORTGAGE. 1.

**JOINT TENANCY** — Conveyance by one joint tenant — Severance — Equitable title — Legal title—Relation back - 231
*See* TRUSTEE. 1.

**JUDGMENT** — Costs — Taxation—Co-defendants—Judgment against one defendant 763
*See* PRACTICE. 1.

**JUDGMENT CREDITOR** — Receiver — Appointment—Jurisdiction—Railway not open for public traffic - - - 8
*See* RAILWAY.

**JURISDICTION**—Commonable rights, Compensation for extinguishment of—Apportionment - - - - 566
*See* COMMON.

JURISDICTION—*continued.*
—— Mortmain — Real estate — Devise — Sale—Extension of time - - - 1
*See* CHARITY. 3.

—— Receiver—Appointment—Railway not open for public traffic - - - 8
*See* RAILWAY.

—— Trustees, Concurrence of—Management—Powers — Shares — Company — Reconstruction - - - - 534
*See* TRUSTEE. 2.

LAMP-POST — Obstruction on highway — Interference with trade—Adjoining owner
*See* HIGHWAY. 329

"LAND"—Direction to accumulate—Purchase of real estate—"For the purchase of land only" - - - - 285
*See* WILL. 1.

—— "Interest in Land"—Mortgage—Priority
*See* TRUSTEE. 1. 231

LAND TRANSFER — *Debts — Administration — Transfer to Devisee — Charge for Payment of Moneys for which the Personal Representatives are Liable—Liability of Personal Representatives for Unknown Debts—Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *s.* 2, *sub-ss.* 2, 3; *s.* 3, *sub-s.* 1—*Law of Property Amendment Act*, 1859 (22 & 23 *Vict. c.* 35), *s.* 29.

The charge provided by sub-s. 1 of s. 3 of the Land Transfer Act, 1897, does not extend to debts for which prior to the commencement of that Act the personal representatives of the debtor would not be liable as regards the personal estate; and, therefore, where the personal representatives have given the usual statutory notices to creditors, the charge does not apply to debts of which they have no notice at the date of the conveyance to the devisees. *In re* CARY AND LOTT'S CONTRACT - - Kekewich J. 463

—— Estate duty payable in respect of real estate —"Testamentary expenses" - 280
*See* WILL. 8.

LANDLORD AND TENANT—*Brewer's Lease—Covenant to buy Beer of Lessors and "their Successors in Business"—Covenant running with the Land—Lease executed by Lessee only—Assignment of Reversion—Breach of Covenant—Injunction at Suit of Assignee*—32 *Hen.* 8, *c.* 34—*Benefit of Covenant a Chose in Action—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *ss.* 10, 58.

In 1892 A. executed under seal an agreement to take an hotel as yearly tenant to B. & Co., and thereby covenanted to purchase all his beer of B. & Co. "and their successors in business." The covenant did not mention "assigns." B. & Co. did not execute the agreement, and there was nothing on the face of it to shew that they were brewers. They were, in fact, brewers, and A. occupied the hotel under the agreement as their tenant and purchased beer of them.

In 1899 B. & Co. sold and conveyed their

LANDLORD AND TENANT—*continued.*
brewery, tied houses (including the hotel), and business to C. & Co., who were brewers, and who incorporated B. & Co.'s business with their own. After the sale B. & Co. ceased to carry on business. Notice of the change of ownership was given by C. & Co. to A., and for a time he purchased beer of them. In an action by C. & Co. to restrain A. from committing a breach of the covenant:—

*Held*, that the covenant was not personal to B. & Co., but ran with the land, and that C. & Co., as successors in business of B. & Co. and owners of the reversion in fee of the hotel, were entitled to the benefit of it:

*Held*, also, that C. & Co., as assigns of B. & Co., being clearly entitled against A. to specific performance of the agreement under which he was in possession of the hotel, could sue him on the covenant in the same manner as they could have done, if B. & Co. had actually executed the original agreement.

*Clegg* v. *Hands*, (1890) 44 Ch. D. 503, and *Walsh* v. *Lonsdale*, (1882) 21 Ch. D. 9, followed.

*Semble:* The benefit of the covenant was a chose in action, assignable in equity before the Judicature Act, 1873, and by virtue of s. 25, sub-s. 6, of that Act the covenant could, after an absolute assignment thereof in writing and due notice given, be sued upon by the assignee. MANCHESTER BREWERY COMPANY *v.* COOMBS
Farwell J. 608

2. —— *Fixtures, Removable—Glass-houses—Right to remove Fruit Trees—Compensation—Agricultural Holdings (England) Act*, 1883 (46 & 47 *Vict. c.* 61), *ss.* 1, 3, 34, 54, 55, 60 — *Market Gardeners' Compensation Act*, 1895 (58 & 59 *Vict. c.* 27), *s.* 4.

A landlord in 1887 demised a farm to defendant for a term expiring in 1901. The lease provided (clause 13) that in the last year the landlord might enter and sow certain seeds, and that the tenant should also leave gratis for the landlord "all the roots remaining unconsumed in the ground, and also all improvements made by the tenant, and all cultivations, dressings, and manures, in consideration of no claim being made by the landlord for similar matters on the tenant now entering"; and (clause 14) that the tenant might, at his own cost, convert into an orchard so much of certain meadow land as he thought proper; and (clause 21) that the Agricultural Holdings (England) Act, 1883, should not apply to the contract of tenancy. Shortly after the tenancy commenced defendant turned part of the meadow land into an orchard in which in 1901 were over 1200 trees (apple, pear, plum, and cherry) in good bearing condition, and, though not capable of removal, worth some hundreds of pounds to an incoming tenant. Defendant also erected ten glass-houses. One had concrete sides, and its glass span-roof substantially rested on the sides and could be removed without damaging the walls. In the case of the other houses the glass span-roofs were supported by and nailed to wide sills which in turn were nailed to and supported by wooden piles driven into the ground. In these houses defendant grew grapes, peaches, nectarines, tomatoes, and strawberries, which he sold in Reading and Covent Garden, carrying on

**LANDLORD AND TENANT**—*continued.*
the trade of a market-gardener with his landlord's knowledge:—
*Held*—
(1.) That at common law defendant could not cut down or remove the orchard trees.
(2.) (Following *Penton* v. *Robart*, (1801) 2 East, 88; 6 R. R. 376, notwithstanding the criticism of it in *Elves* v. *Maw*, (1802) 3 East, 38; 6 R. R. 523), that at common law the defendant could lawfully remove the glass-houses unless precluded by clause 13 of the lease.
(3.) That clause 13 did not preclude him, as on the construction of it "improvements" did not include glass-houses.
(4.) (Following *Smith* v. *Callander*, [1901] A. C. 297, as to the meaning of the similarly worded s. 4 of the Market Gardeners' Compensation (Scotland) Act, 1897), that s. 4 of the Market Gardeners' Compensation Act, 1895, only applied to improvements made after January 1, 1896, and did not assist defendant.
(5.) That as the glass-houses were erected without the landlord's written consent required by s. 3 of the Act of 1883, defendant was precluded from obtaining compensation for them.
(6.) That the common law right of defendant to remove the glass-houses was left untouched by the Act of 1883, s. 34 of which was lawfully excluded by clause 21 of the lease.
(7.) That as the orchard was planted with the landlord's consent in writing, which was held to be given by the lease, defendant was entitled to compensation for the trees under ss. 1 and 3 of the Act of 1883, there being nothing in clause 13 of the lease to exclude him from compensation.
(8.) That if clause 13 must be construed as excluding defendant from statutory compensation, the attempted exclusion was inoperative by reason of s. 55 of the Act of 1883.
The defendant was therefore held to be entitled (*a*) to compensation for the trees, (*b*) to remove the glass-houses. MEARS *v.* CALLENDER **Cozens-Hardy J. 388**

3. —— *Sporting Right—Yearly Hiring—Notice to Determine.*
A verbal notice to determine a right to shoot pheasants, enjoyed from year to year at an annual payment, was given early in March for the 25th then instant, being the end of the current year:—
*Held*, that the notice was reasonable. LOWE *v.* ADAMS - - **Cozens-Hardy J. 598**

—— Receiver, Use or occupation by—Head-lease—Rent—Breach of covenant—Damages
*See* MORTGAGE. 2. - - **721**

—— Will—Construction—Devise of real estate—Lease - - - - **591**
*See* WILL. 10.

**LANDS CLAUSES ACTS**—*Payment out of Court—Proceeds of Sale of Investments—Brokerage—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 69, 80.
In cases where money has been paid into court under a statute incorporating therewith the Lands Clauses Act, 1845, and has been invested in securities, on a petition by the persons absolutely entitled thereto for payment out of the proceeds of sale of the securities, the costs payable by the promoters that paid in the money include the brokerage payable on the sale. *In re* MAGDALEN COLLEGE, OXFORD **Cozens-Hardy J. 786**

—— Compensation for extinguishment of commonable rights—Apportionment **566**
*See* COMMON.

**LEASE.**
*See* under LANDLORD AND TENANT.

**LEASEHOLDS** — Onerous covenants — Duty of vendor to disclose—Rescission - **666**
*See* VENDOR AND PURCHASER. 3.

—— Receiver, Use or occupation by—Head-lease—Rent—Breach of covenant - **721**
*See* MORTGAGE. 2.

—— Title—Trust for sale—Sale by way of underlease - - - - - **383**
*See* VENDOR AND PURCHASER. 8.

**LEGACY**—Ademption pro tanto of settled portion of legacy - - - - **346**
*See* WILL. 2.

**LETTERS**—Charges for—Remuneration of liquidator - - - - - **181**
*See* COMPANY. 14.

**LICENCE**—Way—Annual payment — Prescription—Lost grant—Inference from facts
*See* WAY, RIGHT OF. 1. **198**

**LIFE INSURANCE** — Policy not assignable otherwise than by way of nomination - - - - **471, 476, n.**
*See* FRIENDLY SOCIETY. 1, 2.

**LIGHT**—Enjoyment of—Deed of acknowledgment — Non-disclosure — Contract — Specific performance—Compensation—Costs - - - - **324**
*See* VENDOR AND PURCHASER. 1.

**LIGHTING**—Electric energy—Implied contract not to take it from anybody else—Injunction - - - - **799**
*See* ELECTRIC LIGHTING.

**LIMITED POWER** — Execution — Testamentary appointment—Incomplete disposition—Intention - - - - **794**
*See* POWER OF APPOINTMENT. 2.

**LIQUIDATOR** — Remuneration — Charges for letters - - - - **181**
*See* COMPANY. 14.

**LOCAL AUTHORITY**—Obstruction on highway—Lamp-post—Interference with trade—Adjoining owner - - - **329**
*See* HIGHWAY.

**LOCAL GOVERNMENT**—"Sewer"—"Drain"—"Building"—Semi-detached houses
*See* SEWERS. 2. **126**

—— Sewer—Surface drain—Nuisance by sewage—Drainage of houses—Notice to local authority - - - - **451**
*See* SEWERS. 3.

**LONDON**—Obstruction on highway—Lamp-post—Interference with trade—Adjoining owner - - - - **329**
*See* HIGHWAY.

**MAINTENANCE**—Annuity to widow for benefit of infants—Trustee—Death of widow—Annuity continued - - - **438**
*See* WILL. 12.

**MARKET GARDENERS**—Compensation—Glass-houses—Fruit trees - - **388**
*See* LANDLORD AND TENANT. 2.

**MARRIAGE SETTLEMENT.**
*See* Cases under SETTLEMENT.

**MARRIED WOMAN.**
*See* HUSBAND AND WIFE.

**MEETING**—To pass resolution for winding-up—Notice issued by secretary without authority of directors - - **431**
*See* COMPANY. 10.

**MEMORANDUM OF ASSOCIATION**—Preference shares—Alteration of holders' rights
*See* COMPANY. 3. **309**

**METROPOLIS MANAGEMENT**—Obstruction on highway — Lamp-post — Interference with trade—Adjoining owner - **329**
*See* HIGHWAY.

**MINERALS.**
*See* MINES.

**MINES**—*Clay—Railway Company—Purchase of Surface — Mines and other Minerals — Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 77, 78.

The principles governing cases like *Hext* v. *Gill*, (1872) L. R. 7 Ch. 699, which deal with a reservation of minerals by virtue of a grant or contract, are not applicable to the determination of cases arising out of a statutory reservation of minerals, like that contained in s. 77 of the Railways Clauses Consolidation Act, 1845.

Though a mineral primâ facie includes anything lying under the land which has a value of its own as being capable of being used independently of the land, yet that rule may be modified by the circumstances of the case where the mineral in question is excepted only by virtue of a statutory reservation. Clay forming the surface or subsoil and constituting "the land" purchased for the purposes of the undertaking is not a "mineral" within s. 77 of the Railways Clauses Consolidation Act, 1845, as interpreted by *Lord Provost and Magistrates of Glasgow* v. *Farie*, (1888) 13 App. Cas. 657.

*Semble:* The same clay may be a mineral in one district and not in another.

GREAT WESTERN RAILWAY COMPANY *v.* BLADES **Buckley J. 624**

**MISDESCRIPTION**—Sale by the Court—Conditions of sale—Mistake—Compensation—Rescission - - - **98**
*See* VENDOR AND PURCHASER. 6.

**MISTAKE**—Sale by the Court—Conditions of sale—Misdescription—Compensation—Rescission - - - - **98**
*See* VENDOR AND PURCHASER. 6.

**MONEY HAD AND RECEIVED**—Voidable contract—Assignment of contract - **594**
*See* VENDOR AND PURCHASER. 5.

**MORTGAGE**—*Joint Account — Payment to One*

**MORTGAGE**—*continued.*

*Mortgagee — Partnership — Separate Debt — Payment to Firm.*

Where mortgagees have advanced money on a joint account, payment to one of them during the other's lifetime, though a good discharge of the debt at law, only discharges the security to the extent of the payee's beneficial interest (if any), even though the payee ultimately becomes the survivor in the joint account.

*Matson* v. *Dennis*, (1864) 4 D. J. & S. 345, followed.

*Steeds* v. *Steeds*, (1889) 22 Q. B. D. 537, explained.

Payment to a firm of a separate debt due to a partner will not support a plea of payment to that partner in the absence of evidence, express or implied, that he has authorized the firm to receive it. POWELL *v.* BRODHURST **Farwell J. 160**

2. —— *Leaseholds—Mortgage by Sub-demise —Mortgagor and Mortgagee—Company—Action by Mortgagee or Debenture-holder—Debenture Trust Deed—Trustee Mortgagees—Receiver, Use or Occupation by—Head-lease—Rent—Breach of Covenant —Damages—Landlord—Head-lessor, Rights of— Privity of Estate—Sale of Goods by Receiver— Distress, Loss of Remedy by.*

Since a mortgagee of leaseholds by sub-demise in the usual form is, through absence of privity of estate, not himself liable to the head-lessor for rent or other outgoings, whether he is in possession or not, it follows that a receiver appointed by the Court in an action by the mortgagee against the mortgagor to enforce the security is also under no such liability, his appointment being in right of the mortgagee. Hence the head-lessor cannot require the receiver to pay, out of moneys coming to his hands while in the use or occupation of the mortgaged premises as receiver, any rent or other outgoings in respect of such use or occupation. And there is no equity entitling the head-lessor to claim payment from the receiver by reason of the latter having been put into use or occupation as an officer of the Court, even though he has, by the direction of the Court, sold off the mortgagor's goods on the premises and so deprived the head-lessor of his landlord's remedy by distress.

Thus, in a debenture-holder's action against the trustees of the trust deed who were mortgagees from the company by sub-demise of premises of which the company were lessees, the Court of Appeal, affirming Stirling J., disallowed a claim by the head-lessor against the receiver appointed by the Court to payment, out of the proceeds of the company's goods sold by the receiver while in occupation of the premises, of rent in respect of the occupation and of damages for a breach of the company's covenant in the head-lease to repair. HAND *v.* BLOW - - **C. A. 721**

—— Mortgage—Notice of charge—Annual payment of corn to poor of parish - **750**
*See* CHARITY.

—— Priority — Innocent trustee mortgagee — Legal estate acquired by mortgagee after notice of trust - - **231**
*See* TRUSTEE. 1.

**MORTGAGE**—*continued.*

—— Shares — Equitable mortgage — Pledge — Deposit of certificate—Foreclosure **314**
*See* COMPANY. 6.

—— Surety—Collateral security - - **602**
*See* PRINCIPAL AND SURETY.

—— Tenant for life—Trustees for purposes of Act—Investment on mortgage—Inquiry into title and value - - **790**
*See* SETTLED LAND. 1.

**MORTMAIN**—"Charitable uses"—Will—Direction to purchase land and build dwelling-houses for the poor - - **640**
*See* CHARITY. 2.

—— Corporation sole—Rector—Power to hold personalty — Irregular investment in land - - - - - **487**
*See* CORPORATION.

—— Real estate—Devise—Sale—Extension of time—Jurisdiction - - - **1**
*See* CHARITY. 3.

**NAME** — Company — Registration — Fraudulent purpose—Trade name—Form of injunction - - - - - **513**
*See* COMPANY. 4.

**NAVIGATION** — Navigable non-tidal river — "Tolls"—"Tolls traverse" - **671**
*See* RIVER.

**NEXT OF KIN**—Illegitimate children—Gift to children nominatim — Gift to next of kin of children - - - **578**
*See* WILL. 10.

**NOMINATION**—Policy not assignable otherwise than by way of - - **471, 476, n.**
*See* FRIENDLY SOCIETY. 1, 2.

**NOTICE**—Corporation sole—Rector—Power to hold personalty—Mortmain—Irregular investment in land - - - **487**
*See* CORPORATION.

—— Meeting to pass resolution for winding-up —Notice issued by secretary without authority of directors - - **431**
*See* COMPANY. 10.

—— Mortgage—Priority—Innocent trustee mortgagee—Legal estate acquired by mortgagee after notice of trust - **231**
*See* TRUSTEE. 1.

—— Mortgagee—Notice of charge—Annual payment of corn to poor of parish - **751**
*See* CHARITY. 1.

—— Sporting right—Yearly hiring—Notice to determine - - - - **598**
*See* LANDLORD AND TENANT. 3.

—— Surface drain — Nuisance by sewage — Drainage of houses — Notice to local authority - - - - **451**
*See* SEWERS. 3.

**NUISANCE**—Public or private—Obstruction on highway — Lamp-post — Interference with trade—Adjoining owner - **329**
*See* HIGHWAY.

—— Right to abate—Trespass—Bridge—Liability to repair—Right to repair—Highway - - - - - **518**
*See* BRIDGE.

**NUISANCE**—*continued.*

—— Sewage—Surface drain—Sewer—Drainage of houses—Notice to local authority **451**
*See* SEWERS. 3.

**OBSTRUCTION** —Highway — Lamp-post — Interference with trade—Adjoining owner
*See* HIGHWAY. **329**

**PARISH**—*Division of Parish—Parochial Chapelry or separate Parish.*

A chapelry may form part of a parish although the inhabitants of the chapelry have never been assessed for church-rates or repairs, or taken any part in the election of churchwardens of the parish church, and although owing to the magnitude of the parish the chapelry has always appointed separate overseers and levied separate poor-rates under the Poor Relief Act, 1662.

The fact that the vicar of the parish receives the vicarial tithe of the chapelry and that residents in the chapelry are in the habit of being married at the parish church is almost conclusive evidence that the chapelry is part of the parish. *In re* SANDBACH SCHOOL AND ALMSHOUSE FOUNDATION. ATTORNEY-GENERAL *v.* EARL OF CREWE - - - - **Farwell J. 317**

**PARTIES** — Trustees — Representation — Future rights—Unascertained persons - **479**
*See* FINES AND RECOVERIES. 1.

**PARTNERSHIP**—*Books and Accounts—Right of Partner to Inspect—Inspection by Agent—Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 24, *sub-s.* 9.

Partnership articles provided that proper books of account should be kept by the managing partners for the time being, and that each of the partners should have free access to, and liberty to examine and copy, or take extracts from any of the books and writings of the partnership at all reasonable times:

*Held*, that under this provision, as well as under s. 24, sub-s. 9, of the Partnership Act, 1890, any partner was entitled to have the books and accounts examined on his behalf by an agent appointed by him for the purpose, provided that the agent was a person to whom no reasonable objection could be taken by the other partners, the agent also undertaking not to make use of the information which he should thus acquire except for the purpose of confidentially advising his principal.

Decision of Joyce J., [1901] 1 Ch. 724, reversed. BEVAN *v.* WEBB - - **C. A. 59**

2. —— *Sale of Share — Vendor's Right to Indemnity — Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 31.

The purchaser of a share in a partnership must personally indemnify the vendor against the partnership liabilities. DODSON *v.* DOWNEY. **Farwell J. 620**

—— Mortgage—Joint account—Payment to one mortgagee—Separate debt—Payment to firm - - - - - **160**
*See* MORTGAGE. 1.

**PAYMENT** — Mortgage — Joint account — Payment to one mortgagee—Partnership
*See* MORTGAGE. 1. **160**

**PAYMENT OUT OF COURT**—Brokerage—Proceeds of sale of investments - 786
*See* LANDS CLAUSES ACT.

**PENALTY**—Copyright—Infringement—"Every such offence"—Minimum amount 552
*See* COPYRIGHT.

**PERPETUITY**—Corps of Commissionaires, Bequest to committee of—Charity—Voluntary association - - - 110
*See* WILL. 4.

**PETITION** — Summons — Married woman — Removal of restraint on anticipation
*See* HUSBAND AND WIFE. 2. 221

—— Winding-up of company.
*See* Cases under COMPANY.

**PICTURE**—Copyright—Infringement—Penalty—"Every such offence"—Minimum amount - - - - 552
*See* COPYRIGHT.

**PLEDGE**—Shares—Equitable mortgage—Deposit of certificate—Foreclosure - 314
*See* COMPANY. 6.

**POLICY**—Not assignable otherwise than by way of nomination - - 471, 476, n.
*See* FRIENDLY SOCIETY. 1, 2.

**POWER OF APPOINTMENT**—*Execution—Document "purporting" to be a Will.*

Under a settlement dated in 1848 a married woman had a power of appointment amongst her children exercisable by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be by her sealed and delivered in the presence of and attested by two or more credible witnesses, or by her last will or testament, "or any writing in the nature of or purporting to be a will or codicil." She signed a written document which was expressed to be her "last will," and which, if valid as a testamentary instrument, would have operated as an execution of the power. This document, having been insufficiently executed, was not admitted to probate:—

*Held*, that although the document might not be "in the nature of" a will, yet, as it clearly "purported to be" the will of the donee of the power, it was a valid execution of the power. *In re* BROAD. SMITH *v.* DRAEGER
Kekewich J. 86

2. —— *Execution—Limited Power—Testamentary Appointment—Incomplete Disposition—Intention—"After the Death of A." read "subject to A.'s Interest."*

Under a marriage settlement the husband and wife took successive life interests in a trust fund, the wife's interest being cut down to one moiety on remarriage, and subject thereto the fund was settled on trust for the issue of the marriage as the husband should appoint, and in default of appointment for the sons at twenty-one or daughters at twenty-one or marriage, with the usual hotchpot clause. By his will, which recited that he had power to appoint the fund after the death of his wife, the husband appointed that "after the death of my said wife" three-fifths of the fund should be held in trust for his elder son and two-fifths for his younger son, these sons being the only issue of the marriage.

The wife having remarried after her husband's death:—

*Held*, that the moiety of the income thereby set free during her life passed under the appointment, the Court finding on the face of the will an intention to appoint the whole fund subject to the wife's interest, and being therefore at liberty, in accordance with the principle in *Maddison* v. *Chapman*, (1858) 4 K. & J. 709, 719, to read the words "after the death of my said wife" as "subject to my said wife's interest." *In re* SHUCKBURGH'S SETTLEMENT. ROBERTSON *v.* SHUCKBURGH - - - Farwell J. 794

3. —— *Execution of Power—Will—Limited Power—Special Power—General Gift—"Disposing Power"—Power Non-existent at Date of Will—Exercising Power by Anticipation—Intention.*

H. H. the younger, by his will dated in 1884 and confirmed by a codicil dated in March, 1893, gave "all the residue of the property over which at the time of my death I shall have a disposing power" to trustees upon trust for sale, conversion and investment, and directed them to pay the yearly income arising from his trust estate to his wife for life or widowhood, and subject to the trust aforesaid to stand possessed of his trust estate upon trusts for his children.

H. H. the elder, the father of H. H. the younger, by his will, dated in June, 1893, empowered each child of his by his or her will, or any codicil thereto, to appoint in favour of his or her wife or husband the whole or any part of the yearly income of his or her share of his (the testator's) residuary estate for the life of such wife or husband, and directed that a sum of 4000*l.* thereby directed to be raised should be held upon the same or the like trusts and subject to the same or the like powers and provisions as were thereinbefore declared with respect to the share of his son H. H. the younger in the residue.

H. H. the elder died in 1895, and H. H. the younger in 1899 leaving a widow and three children. H. H. the younger had no power of appointment exercisable in favour of his widow other than the power contained in the will of his father:—

*Held*, that the language of the will of H. H. the younger was not sufficient to shew an intention to execute a non-existent special power, and accordingly that his will did not operate as an appointment under the power given him by the will of his father.

Whether it is possible, as a matter of law, to execute by anticipation a special power not created until after the alleged execution, *quære*.

Decision of Byrne J., [1900] 2 Ch. 332, affirmed. *In re* HAYES. TURNBULL *v.* HAYES
C. A. 529

—— Appointment—Married woman—Restraint on anticipation—Release of power 82
*See* HUSBAND AND WIFE. 1.

—— Estate duty—Incidence—Will—Appointed fund—Residue - - 372, 659
*See* ADMINISTRATION. 2.
WILL. 6.

**PRACTICE**—*Costs — Taxation — Co-defendants—Judgment against One Defendant—Liability of One Defendant for all Plaintiffs' Costs.*

In an action against two defendants to restrain an infringement of copyright, the plaintiffs obtained an injunction with costs against one defendant, G., but failed to obtain any order against the other defendant, to whom, however, no costs were given. By the order as drawn up the defendant G. was directed to pay to the plaintiffs "their costs of this action": the taxing master allowed the plaintiffs all the costs of the action, including those incurred against the second defendant: the defendant G. objected that in this way he was unfairly made to pay the costs of the plaintiffs' unsuccessful attempt to fix his co-defendant with liability. The taxing master overruled this objection, on the ground that the order did not direct him to make any deduction on account of the joinder of the second defendant.

On a summons to review:—

*Held*, that the order was clear, that the taxing master's view was correct, and that the defendant G. must pay all the plaintiffs' costs of the action. KELLY'S DIRECTORIES, LIMITED *v.* GAVIN AND LLOYDS - - Byrne J. 763

2. —— *Costs—Taxation—Order to Tax Costs and to include therein Remuneration of Receiver—Separate Certificate as to Costs only—Rules of Supreme Court, Order LXV., r. 27, sub-r. 25.*

Under an order directing the taxing master to tax the plaintiffs' costs of an action, including the remuneration of the receivers and managers appointed in the action, and to certify the balance after deducting certain costs of the defendants, the taxing master has no power to make a separate certificate for the costs alone. SILKSTONE AND HAIGH MOOR COAL COMPANY *v.* EDEY C. A. 652

3. —— *Costs—Taxation—Party and Party—Special Fee to Counsel—Disallowance.*

A "special" fee to leading counsel was disallowed on taxation as between party and party, although, owing to previous retainer by other parties, the services of a leader practising in the particular Court could not be obtained by the party whose costs formed the subject of the taxation. *In re* PARSON. PARSON *v.* PARSON Joyce J. 176

—— Appeal, Powers of Court of—Variation of judgment in favour of respondent giving no cross-notice of appeal - - 671
*See* RIVER.

—— Parties—Trustees—Representation—Future rights—Unascertained persons - 479
*See* FINES AND RECOVERIES. 1.

—— Payment out of court—Brokerage—Proceeds of sale of investments - 786
*See* LANDS CLAUSES ACT.

**PRE-EMPTION**—Right of—Contract to give "first refusal" of land—Negative contract - - - - - 37
*See* CONTRACT. 1.

**PREFERENCE SHARES**—Memorandum of association—Alteration of holders' rights
*See* COMPANY. 3. 309

**PREFERENCE SHARES**—*continued.*

—— Surplus assets—Revenue representing dividends never declared - 184, 190, n.
*See* COMPANY. 12, 13.

**PREFERENTIAL PAYMENTS IN BANKRUPTCY**—Poor and district rates—Water rate payable by meter—Apportionment - - - - 93
*See* COMPANY. 11.

**PRESCRIPTION**—Way—User.
*See* Cases under WAY.

**PRESUMPTION**—Lost surrender—River—"Tolls"—Power to erect "stanch" 671
*See* RIVER.

—— Public footway—Private carriage-way along the same line—Dedication - 647
*See* WAY, RIGHT OF. 2.

**PRINCIPAL AND SURETY**—*Mortgage—Collateral Security.*

The right of a surety to the benefit of a collateral security is not in abeyance till he is called on to pay.

*South* v. *Bloxam*, (1865) 2 H. & M. 457, explained. DIXON *v.* STEEL Cozens-Hardy J. 602

**PRIORITY**—Mortgage—Innocent trustee mortgagee—Legal estate acquired by mortgagee after notice of trust - 231
*See* TRUSTEE. 1.

**PRIVITY OF ESTATE**—Head-lessor, Rights of—Rent—Sale of goods by receiver—Distress, Loss of remedy by - - 721
*See* MORTGAGE. 2.

**PUBLIC HEALTH**—Drainage of houses—Surface drain—Nuisance by sewage—Notice to local authority - - - 451
*See* SEWERS. 3.

—— "Sewer"—Effect of laying sewer in another person's land - - - 126
*See* SEWERS. 2.

—— Sewer—Pumping station—Compensation or purchase - - - - 768
*See* SEWERS. 1.

**PUMPING STATION**—Sewer—Compensation or purchase - - - - 768
*See* SEWERS. 1.

—— Water supply—Swimming bath—School—Charity—Domestic purposes - 813
*See* WATER.

**PURCHASER**—Vendor and.
*See* Cases under VENDOR AND PURCHASER.

**RAILWAY**—*Judgment Creditor—Appointment of Receiver—Jurisdiction—Railway not open for Public Traffic—Discretion—Railway Companies Act*, 1867 (30 & 31 *Vict. c.* 127), *s.* 4.

*Per* Farwell J.: Under s. 4 of the Railway Companies Act, 1867, the Court has jurisdiction to appoint a receiver of the undertaking of a railway company, even though the railway is not yet open for public traffic.

*Per* the C. A.: Without deciding that there is jurisdiction to appoint a receiver in such a case, but assuming that there is jurisdiction, still a receiver ought not to be appointed when there

**RAILWAY**—*continued.*
is not, and probably will not, until the line is opened for traffic, be any money for him to receive.
*Per* Rigby L.J. (Vaughan Williams L.J. doubting): Even if a receiver were appointed before the railway was open for public traffic, the Court would probably give a judgment creditor leave to levy execution on chattels of the company, notwithstanding the appointment.
*In re Manchester and Milford Ry. Co.*, (1880) 14 Ch. D. 645, explained. *In re* KNOTT END RAILWAY ACT, 1898 - - - C. A. 8

—— Mines and other minerals—Clay—Purchase of surface - - - - 624
*See* MINES.

**RATES**—Preferential payments in bankruptcy—Poor and district rates—Water rate payable by meter—Apportionment 93
*See* COMPANY. 11.

**RECEIVER** — Appointment of — Jurisdiction — Railway not open for public traffic 8
*See* RAILWAY.

—— Costs—Order to tax costs and to include remuneration of receiver — Separate certificate as to costs only - 652
*See* PRACTICE. 2.

—— Use or occupation by—Head-lease—Rent—Breach of covenant—Damages - 721
*See* MORTGAGE. 2.

**RECONSTRUCTION** — Company — Shares — Concurrence of trustees — Management — Powers - - - - 534
*See* TRUSTEE. 2.

**RECTIFICATION**—Register—Lapse of time 265
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**RECTOR**—Corporation sole—Power to hold personalty — Mortmain — Irregular investment in land - - - 487
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**REDUCTION OF CAPITAL** — Confirmation by Court—Preference and ordinary shareholders - - - - 746
*See* COMPANY. 5.

**REFUSAL**—"First refusal"—Contract to give—Negative contract - - - 37
*See* CONTRACT. 1.

**REGISTER**—Rectification—Lapse of time 265
*See* COMPANY. 8.

**REGISTRATION**—Name of company—Fraudulent purpose—Trade name—Form of injunction - - - - 513
*See* COMPANY. 4.

**RELEASE** — Power of appointment — Married woman—Restraint on anticipation 82
*See* HUSBAND AND WIFE. 1.

**REMAINDERMAN**—Tenant for life and—Investment—Proceeds of realization of insufficient security—Apportionment
*See* SETTLEMENT. 3. 584

**REMOTENESS** — Uncertainty — Illegality — Statutory confirmation - - 37
*See* CONTRACT. 1.

**REMUNERATION** — Liquidator — Charges for letters - - - - 181
*See* COMPANY. 14.

**RENT**—Receiver, Use or occupation by—Head-lease—Breach of covenant—Damages
*See* MORTGAGE. 2. 721

**REPAIR**—Bridge—Liability—Right to repair
*See* BRIDGE. 518

**REPRESENTATION** — Trustees—Future rights—Unascertained persons - - 479
*See* FINES AND RECOVERIES. 1.

**RESCISSION** — Contract — Return of deposit — Jurisdiction—Vendor's summons 383
*See* VENDOR AND PURCHASER. 8.

—— Leaseholds—Onerous covenants—Duty of vendor to disclose - - - 666
*See* VENDOR AND PURCHASER. 3.

—— Sale by the Court—Conditions of sale—Mistake — Misdescription — Compensation - - - - - 98
*See* VENDOR AND PURCHASER. 6.

**RESERVATION** — Support—Implied reservation on conveyance of tenement alleged to be servient—Easement - - 300
*See* SUPPORT.

**RESIDUE** — Estate duty — Incidence — Will — Appointed fund - - - 659
*See* WILL. 6.

—— Estate duty — Incidence — Will exercising power of appointment—Appointed fund
*See* ADMINISTRATION. 2. 372

**RESTRAINT OF TRADE** — Validity — Sale to wholesale trader on contract requiring him to resell on specified terms - 275
*See* CONTRACT. 2.

**RESTRAINT ON ANTICIPATION** — Married woman—Power of appointment—Release of power - - - - 82
*See* HUSBAND AND WIFE. 1.

—— Removal of—Married woman—Summons—Petition - - - - 221
*See* HUSBAND AND WIFE. 2.

**RETAINER** — Administrator — Creditor — "Not unduly preferring" - - 52
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—— Corporate creditor—Grant of administration to officer - - - 399
*See* ADMINISTRATION. 3.

—— Joint or separate—Same solicitor appearing for trustees and company - - 377
*See* COMPANY. 1.

**REVENUE**—Estate duty—Incidence—Appointed fund—Residue - - - 659
*See* WILL. 6.

—— Estate duty — Incidence — Will exercising power of appointment—Appointed fund—Residue - - - - 372
*See* ADMINISTRATION. 2.

—— "Estate duty"—Settlement estate duty—Direction to pay estate duty out of residuary personalty - - 830
*See* WILL. 7.

—— Estate duty—"Testamentary expenses"
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**REVERSIONARY INTERESTS** — Covenant to settle after-acquired property 779, 820
*See* SETTLEMENT. 1, 2.

**RIGHT OF WAY**—User—Prescription.
*See* Cases under WAY, RIGHT OF.

**RIVER** — *Navigable Non-tidal River — Public Right of Navigation — Power to Levy Tolls — "Toll"—"Toll thorough"—"Toll traverse" — Royal Charter—Validity—Construction — Grant of "Sole and exclusive Passage and Transit for Boats, &c.," through a River—Presumption of Lost Surrender—Permissive Statutory powers—Implied Obligation—Power to erect "Stanch"—Authority to Levy Toll for Passage—Implied Obligation to Maintain and Repair—6 Geo. 1, c. 29—Practice—Powers of Court of Appeal—Variation of Judgment in Favour of Respondent giving no Cross-notice of Appeal — Rules of Supreme Court, 1883, Order LVIII., r. 4.*

In the year 1618 the Crown granted to John Gason a patent for an invention for making rivers navigable by means of locks or sluices for the term of twenty-one years, with power to take during the term all profits accruing by means of any vessel passing or coming in or upon any river so made navigable by him. The patent prohibited all persons other than the grantee, his executors, &c., and licensees, from passing on any river so made navigable by him or from using the invention.

At the date of this patent the river Ouse from St. Neots to St. Ives was navigable only in sections, namely, between mill-dams, six in number, which were thrown across the stream, one at St. Neots, one at St. Ives, and the others at intermediate places.

Gason assigned his patent to Arnold Spencer, and before 1625 six locks had been erected on the river Ouse—one near to each mill-dam—upon channels connected with the river and cut through land belonging to or acquired for the purpose by Spencer, so that by means of those channels and locks boats could pass by water from St. Neots to St. Ives.

In 1628 Spencer obtained from the Crown another patent or charter. This charter contained a recital that Spencer had informed the King that by his invention and great charge the river Ouse from St. Ives to St. Neots had been made navigable, and that he intended at his own charge to make other rivers navigable. And the King thereby granted to Spencer, his executors, &c., full and free licence and authority, during a term of eleven years from July 21, 1628, to exercise within the realm the erecting of locks, &c., for making rivers navigable. And, for that the King was informed that Spencer had already made navigable the river Ouse from St. Ives to St. Neots, "the benefit whereof Spencer or his assigns now have or ought to have and enjoy," the King granted to Spencer, his executors, &c., as well all the benefit which he had received, or which he should or might receive, for or in respect of the river so made navigable by him, as also all such benefit as should or might accrue for or in respect of any river thereafter during the said term by Spencer or his assigns to be made navigable, to hold the said benefits from

**RIVER**—*continued.*

the end of the term of eleven years during the term of eighty years thence next ensuing.

There was a proviso that Spencer, his executors, &c., should not take for any vessel which should pass through any of the sluices any greater rate than (in effect) 3*d.* per ton. The grant reserved to the Crown a rent of 5*l.* per annum during the term of eighty years.

In 1638 Spencer obtained from the Crown another patent or charter by which the King, wishing that Spencer might receive adequate compensation for his great costs and expenses in carrying out these works, granted to him, his heirs and assigns, in perpetuity "(as much as in us lieth) the sole and exclusive passage and transit for boats . . . . and other vessels laden with corn, coal, and all other goods and merchandise" through all that river of Ouse leading from St. Ives to St. Neots, and also that Spencer, his heirs, &c., from time to time in perpetuity might and should have thenceforth for the future the sole licence and power of carrying, &c., in and through all the river aforesaid all food, coal, and merchandise in ships and other vessels ascending and descending, and also all profits whatsoever by reason of the carrying of any corn, &c., in and upon the river for the future in or upon all ships and other vessels whatsoever between the several towns and places aforesaid, yielding thereout annually to the Crown for the said passage in and upon the Ouse from St. Ives the sum of 6*l.* 13*s.* 4*d.* This patent contained no express grant of a right to take a "toll," nor did any of the patents expressly impose on the grantees any obligation to maintain or work the locks.

The rent of 6*l.* 13*s.* 4*d.* was regularly paid thereafter, but the rent reserved by the charter of 1628 was never paid. A toll of 3*d.* per ton had been for more than two centuries charged and paid for the passage of boats laden with merchandise through each of the six locks.

In an action brought in 1898 by the Attorney-General, at the relation of the county council of Huntingdonshire, and by the county council as plaintiffs, to establish on behalf of the public as against the defendant, the successor of Spencer, the right of passage along the river, including the locks, with boats and other vessels, subject as to boats laden with merchandise to the 3*d.* toll for each lock, and to establish an obligation on the part of the defendant to maintain the locks in an efficient state:—

*Held*, by Farwell J., that, under the charter of 1628, the locks were dedicated to the public for ever, and that a "toll traverse" was granted to Spencer for the term of eighty years for boats laden with merchandise, but that unladen boats were entitled to free passage:

*Held*, therefore, that the Crown had no power to grant the charter of 1638, and that that charter was invalid; that since the expiration of the term of eighty years the 3*d.* toll had been paid per incuriam, and that the public had a right of passage through the six locks without paying any toll, but that the defendant was not bound to maintain or work the locks:

*Held*, by the Court of Appeal, that the charter of 1628 never had any effective operation, and

**RIVER**—*continued.*
that it must be deemed to have been merged in the charter of 1638 or surrendered, and (per Stirling L.J.) that, if necessary, a lost surrender might be presumed:

*Held*, also, that the charter of 1638 was within the power of the Crown to grant and was valid, and that, though the word "toll" was not used in the charter, the public were entitled to pass through the locks on payment of a reasonable toll for boats laden with merchandise, but that unladen boats were entitled to free passage.

But, *held*, that the defendant was bound to maintain and to work the locks.

A Royal charter ought, if possible, to be so construed that it shall not exceed the powers of the Crown.

*Per* Vaughan Williams L.J.: There was sufficient evidence of the dedication of the river as a common highway by the riparian proprietors and others, and of the locks by the owners thereof, prior to the grant of the charter of 1638, and this state of things was clinched by the grant of that charter, whereby the Crown accepted the dedication.

But, at any rate, the defendant and his predecessors, who had paid to the Crown the rent reserved by that charter and had enjoyed the privileges conferred by it, including the collection of tolls, could not be heard to say that there was no public right to use the river on payment of the proper toll:—

*Held*, by Stirling L.J., that the charter of 1638 was in the nature of a grant of a franchise, and, by analogy to the cases relating to grants of a right of ferry, that the Crown had power to make such a grant.

By an Act, 6 Geo. 1, c. 29, passed in 1720, power was conferred on a predecessor of the defendant to construct a "stanch" in the river below St. Ives (at which point it was a public navigable river) and to repair and maintain the same, but no obligation was in terms imposed upon him. The Act contained a recital that the making, maintaining, and repairing of the "stanch" would necessarily be a great charge and expense to the grantee, his heirs and assigns, and it was enacted that it should be lawful for the grantee, his heirs and assigns, from and after the repairing or erecting the stanch, from time to time and at all times to demand and take for all goods which should be carried by boat or other vessel up or down that part of the river the tolls in the Act specified:—

*Held*, by Farwell J., that the public were entitled to passage by boats, &c., through the stanch, subject as to boats, &c., laden with goods to payment of the statutory toll, but that the defendant was not bound to maintain the stanch:

*Held*, by the Court of Appeal, that there was an implied obligation on the part of the defendant to maintain the stanch, and that, unless he did so, he could not levy the tolls.

The judgment at the trial of the action declared that the public were entitled to pass through the locks without paying any toll, and through the stanch on payment of the statutory toll, and that the defendant was not liable to maintain or work any of the locks or the stanch. The defendant appealed from the judgment, other

**RIVER**—*continued.*
than the latter part of the declaration. The plaintiffs gave no cross-notice of appeal:

*Held*, that the Court of Appeal, while allowing the appeal to the extent of declaring that the defendant was entitled to a reasonable toll for passage of boats through the locks, had power also, under Order LVIII., r. 4, to vary the judgment in favour of the plaintiffs by declaring that the defendant was bound to maintain and work both the locks and the stanch, and the judgment was varied accordingly. ATTORNEY-GENERAL *v.* SIMPSON - - - - - **C. A. 671**

—— "Weirs"—Ownership of soil—Presumption—Incorporeal right - - **401**
*See* FISHERY.

**ROYAL CHARTER**—Validity—Grant of "sole and exclusive passage and transit for boats, &c.," through a river - **671**
*See* RIVER.

**RULES OF SUPREME COURT**:—

—— **Order LVIII., r. 4**—*Appeals to the Court of Appeal* - - - - **671**
*See* RIVER.

—— **Order LXV., r. 27, sub-r. 25** - - **652**
*See* PRACTICE. 2.

**SALE**—Mortmain—Real estate—Devise—Extension of time—Jurisdiction - - **1**
*See* CHARITY. 3.

—— Vendor and purchaser.
*See* Cases under VENDOR AND PURCHASER.

**SCHOOL**—Water supply—Swimming bath—Charity—Domestic purposes - **813**
*See* WATER.

**SET-OFF**—Costs—Equitable set-off—Debts "en autre droit" - - - **773**
*See* VENDOR AND PURCHASER. 4.

**SETTLED LAND**—*Investment on Mortgage—Tenant for Life—Trustees for Purposes of Act—Inquiry into Title and Value—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 21 (*i.*); *s.* 22, *sub-s.* 2.

Upon an investment on mortgage under s. 21 (i.) of the Settled Land Act, 1882, in accordance with a direction by the tenant for life given under s. 22, sub-s. 2, it is the duty of the trustees for the purposes of the Settled Land Acts to satisfy themselves as to value, title, and form of the particular mortgage.

*Semble*, the same principle applies to other investments under s. 21 (i.). *In re* HOTHAM. HOTHAM *v.* DOUGHTY - **Cozens-Hardy J. 790**

2. —— *Timber—Conversion—Administration—Lunacy.*

Both the tenant for life, impeachable for waste, and the tenant in fee in remainder of land subject to an administration suit were lunatic. Under an order made in Chancery and in Lunacy timber was cut and sold:—

*Held*, that the proceeds of the timber were, subject to the life interest, personal estate of the tenant in fee. HARTLEY *v.* PENDARVES
**Cozens-Hardy J. 498**

**SETTLED LAND**—*continued.*

—— Marriage settlement.
*See* Cases under SETTLEMENT.

**SETTLEMENT**—*Covenant to Settle After-acquired Property—Reversionary Interest—Conversion for Benefit of Persons entitled in Succession.*

The rule in *Howe* v. *Earl of Dartmouth*, (1802) 7 Ves. 137; 6 R. R. 96, does not apply in the case of a settlement by deed, and apparently only applies where there is a disposition by will of residuary personal estate given as one fund to be enjoyed by several persons in succession. *In re* VAN STRAUBENZEE. BOUSTEAD *v.* COOPER
**Cozens-Hardy J. 779**

2. —— *Covenant to Settle After-acquired Property—"Usual" Clauses—Married Woman—Agreement for a Settlement—Reversionary Interest in Personalty subject to Power of Appointment—Exercise of Power.*

By the marriage settlement of M., dated in 1854, property was settled upon trust, after the deaths of himself and his wife, for the children of the marriage as M. and his wife should jointly appoint; and in default of such appointment, as the survivor should appoint; and in default of any appointment, in trust for all the children who should attain twenty-one in equal shares. There were only two children who attained twenty-one. One of them, C., by an ante-nuptial agreement, agreed to settle "all or half or other share and interest whatsoever" in the property subject to the trusts of the original settlement. The agreement provided that the settlement should contain certain specified provisions, and generally such other agreements, clauses, and provisions as were "usually inserted in settlements of a like kind." M. and his wife, who predeceased him, made no joint appointment under the deed of 1854, but by his will, in exercise of his power, he appointed the sum of 2000*l.* to C. absolutely:—

*Held*, that a covenant to settle after-acquired property was not a "usual" clause in settlements of a like kind with that to be executed in accordance with the agreement for a settlement, and that the 2000*l.* was not bound by the agreement. *In re* MADDY'S ESTATE. MADDY *v.* MADDY
**Joyce J. 820**

3. —— *Investment—Proceeds of Realization of Insufficient Security—Tenant for Life and Remainderman—Apportionment.*

Funds subject to the trusts of a settlement comprised a mortgage security which, pursuant to the trusts, was transferred to the trustees. The interest was irregularly paid, and ultimately the security was realized at a considerable loss:—

*Held*, that the sum realized ought to be apportioned between the tenant for life and remaindermen under the settlement in proportion to the amounts due at the date when it was recovered in respect of arrears of interest and in respect of principal.

The principle of *In re Moore*, (1885) 54 L. J. (Ch.) 432; 33 W. R. 447, preferred to that of *In re Foster*, (1890) 45 Ch. D. 629. *In re* ALSTON. ALSTON *v.* HOUSTON - - **Kekewich J. 584**

—— Ademption pro tanto of settled portion of legacy - - - - **346**
*See* WILL. 2.

**SETTLEMENT**—*continued.*

—— Bankruptcy, Husband's interest determinable on—Post-nuptial settlement—Recital of ante-nuptial settlement - **145**
*See* FRAUDULENT CONVEYANCE.

—— Disentailing assurance of money not yet ascertained—Real estate limited in strict settlement - - - - **290**
*See* FINES AND RECOVERIES. 2.

**SETTLEMENT ESTATE DUTY**—"Estate duty"—Direction to pay estate duty out of residuary personalty - - **830**
*See* WILL. 7.

**SEVERANCE**—Tenements—Precarious easement—Implied grant - - - **502**
*See* WATERCOURSE.

**SEWERS**—*Power to carry through or under Street or Lands—Pumping-station—Compensation or Purchase—Disposal of Sewage—"Sewer"—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 15, 16, 27.

An engine-house with pump and machinery, erected partly above and partly below the level of the ground, for lifting and forcing along a rising main the sewage of a district to a common outfall for treatment, is not a "sewer" within the meaning of s. 16 of the Public Health Act, 1875, which a local authority is thereby empowered to carry through or under any street, or any land within its district on making compensation to the owner, but is a work for the purpose of "receiving or otherwise disposing of sewage" within s. 27, for which the necessary land must be purchased or leased. KING'S COLLEGE, CAMBRIDGE *v.* UXBRIDGE RURAL DISTRICT COUNCIL
**Byrne J. 768**

2. —— *"Sewer"—"Drain"—"Building"—Semi-detached Houses—Effect of laying Sewer in another Person's Land—Local Government—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 13.

The plaintiff and the defendant were the owners respectively of two plots of land adjoining a road in which there was a public sewer vested in the local authority. Each of them was also the owner of one-half of the road so far as it ran with his plot.

The defendant first acquired his plot, and built thereon a pair of semi-detached houses. The drains from each of the houses joined at a point on the defendant's land, and from that point the sewage was carried by one culvert into the public sewer. Part of the culvert was carried through the portion of the road which then belonged to the plaintiff's predecessor in title, and was constructed under circumstances which made its construction a trespass. The plaintiff, having purchased his plot and the adjoining half of the road, required the defendant to remove the portion of the culvert which lay under the latter:—

*Held*, (1.) that the defendant's pair of semi-detached houses constituted "one building only" within the meaning of s. 4 of the Public Health Act, 1875, and that the culvert, from the point of junction of the drainage of the two houses, was a "drain" and not a "sewer" within the meaning of that section; (2.) that even if the culvert was

**SEWERS**—*continued.*
a sewer the defendant could not by his wrongful act vest in the local authority the part of it which lay in the plaintiff's land, and that the plaintiff was entitled to have that part removed. HEDLEY *v.* WEBB - - - Cozens-Hardy J. 126

3. —— *Surface Drain—Nuisance by Sewage—Drainage of Houses—Notice to Local Authority—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 21.
A drain, which ran along a highway past a village and emptied itself into a disused quarry at the foot of the plaintiff's garden, had been used for many years to carry surface water, and also slop water, from some of the houses adjoining the highway. This drain was originally a highway drain, but was now a sewer vested in the rural sanitary authority under the Public Health Act, 1875. The solid sewage matter from the houses in the village drained into cesspools; but recently one of the householders, purporting to act under s. 21 of the Public Health Act, without any notice to the local authority, constructed a water-closet and discharged the solid sewage matter therefrom into this drain by means of a communication which he already had with the drain for the purpose of carrying off his slop water, thereby causing a nuisance to the plaintiff:—
*Held*, by Byrne J. and by the Court of Appeal, that he ought to be restrained by injunction: by Byrne J., following *Kinson Pottery Co.* v. *Poole Corporation*, [1899] 2 Q. B. 41, on the ground that the permission of the local authority to use the drain for the passage of slop water did not authorize its user for every kind of sewage matter; by Collins L.J. on the ground that the conditions imposed by the section as to notice and otherwise had not been complied with. GRAHAM *v.* WROUGHTON - - C. A. 451

**SHAREHOLDERS AND SHARES.**
*See* Cases under COMPANY.

**SOLICITOR**—Debenture-holders' action — Costs —Same solicitor appearing for trustees and company — Retainer — Joint or separate - - - - 377
*See* COMPANY. 1.

—— Debenture-holders' action—Deficient estate — Costs of plaintiff — Solicitor and Client—Party and party - - 357
*See* COMPANY. 2.

—— Trustee and cestui que trust — Breach of trust — Solicitor trustee — Fraud — Appropriation - - - 231
*See* TRUSTEE. 1.

**SPECIFIC PERFORMANCE** — Bankruptcy — Specific performance against vendor's trustee in bankruptcy - - 122
*See* VENDOR AND PURCHASER. 7.

—— Contract — Enjoyment of light — Deed of acknowledgment — Non-disclosure — Compensation—Costs - - 324
*See* VENDOR AND PURCHASER. 1.

—— Costs—Equitable set-off—Debts "en autre droit" - - - - 773
*See* VENDOR AND PURCHASER. 4.

**SPECIFIC TRUST**—General or specific—Trust affecting conscience of legatee as to part - - - - - 372
*See* ADMINISTRATION. 2.

**SPORTING RIGHT**—Yearly hiring — Notice to determine - - - - 598
*See* LANDLORD AND TENANT. 3.

**"STANCH"**—Power to erect—Implied obligation to maintain and repair—"Tolls"
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22 Hen. 8, c. 5—*Bridges* - - - 518
*See* BRIDGES.
32 Hen. 8, c. 34—*Covenants* - - 608
*See* LANDLORD AND TENANT. 1.
13 Eliz. c. 5—*Fraudulent Conveyances* - 145
*See* FRAUDULENT CONVEYANCE.
13 Eliz. c. 10, s. 3—*Eleemosynary Corporations*
*See* CORPORATION. 487
29 Car. 2, c. 3, s. 4—*Statute of Frauds* - 145
*See* FRAUDULENT CONVEYANCE.
6 Geo. 1, c. 29—*Local* - - - 671
*See* RIVER.
11 Geo. 4, c. 4, ss. 37, 66—*Inclosure* - 750
*See* CHARITY. 1.
2 & 3 Will. 4, c. 71, ss. 2, 4—*Prescription* 350
*See* WAY, RIGHT OF. 3.
—— —— ss. 2, 5 - - - - 198
*See* WAY, RIGHT OF. 1.
3 & 4 Will. 4, c. 74, ss. 1, 71—*Fines and Recoveries* - - - - 290
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*See* FINES AND RECOVERIES. 1.
8 & 9 Vict. c. 18, ss. 69, 80—*Lands Clauses* 786
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8 & 9 Vict. c. 20, ss. 77, 78—*Railways Clauses*
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10 & 11 Vict. c. 17, ss. 35, 53—*Waterworks Clauses* - - - - 813
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17 & 18 Vict. c. 97, ss. 15–17—*Inclosure* 566
*See* COMMON.
18 & 19 Vict. c. 120, s. 130—*Metropolis Management* - - - - - 329
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22 & 23 Vict. c. 35, s. 29—*Law of Property Amendment* - - - - 463
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25 & 26 Vict. c. 68, s. 6—*Fine Arts Copyright*
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*See* WATER. 813

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30 & 31 Vict. c. 127, s. 4—*Railway Companies* *See* RAILWAY. 8

30 & 31 Vict. c. 131, s. 11—*Companies* - 746 *See* COMPANY. 5.

36 & 37 Vict. c. 66, s. 25, sub-s. 6—*Judicature* *See* LANDLORD AND TENANT. 1. 608

37 & 38 Vict. c. 78, s. 9—*Vendor and Purchaser* - - - - 383 *See* VENDOR AND PURCHASER. 8.

38 & 39 Vict. c. 55, ss. 4, 13—*Public Health* *See* SEWERS. 2. 126

—— —— ss. 4, 15, 16, 27 - - 768 *See* SEWERS. 1.

—— —— ss. 4, 21 - - - - 451 *See* SEWERS. 3.

—— —— ss. 51, 56, 57 - - - 813 *See* WATER.

38 & 39 Vict. c. 60, s. 15—*Friendly Societies* 471, 476, n. *See* FRIENDLY SOCIETY. 1, 2.

40 & 41 Vict. c. 26, s. 3—*Companies* - 746 *See* COMPANY. 5.

44 & 45 Vict. c. 41, s. 6—*Conveyancing and Law of Property* - - - 502 *See* WATERCOURSE.

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45 & 46 Vict. c. 38, s. 21 (i.); s. 22, sub-s. 2—*Settled Land* - - - 790 *See* SETTLED LAND. 1.

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51 & 52 Vict. c. 62, s. 1, sub-s. 1 (*a*)—*Preferential Payments in Bankruptcy* 93 *See* COMPANY. 11.

52 & 53 Vict. c. 63, s. 3—*Interpretation Act* *See* WILL. 1. 285

52 & 53 Vict. c. clxxxi., ss. 46, 47, 52—*Electric Lighting Orders Confirmation (Mid-London)* - - - - 799 *See* ELECTRIC LIGHTING.

53 & 54 Vict. c. 16, s. 1, sub-s. 1—*Working Classes Dwellings* - - - 640 *See* CHARITY. 2.

53 & 54 Vict. c. 39, s. 24, sub-s. 9—*Partnership* *See* PARTNERSHIP. 1. 59

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53 & 54 Vict. c. 39, s. 31 - - - 620 *See* PARTNERSHIP. 2.

53 & 54 Vict. c. 71, s. 13—*Bankruptcy* - 122 *See* VENDOR AND PURCHASER. 7.

54 & 55 Vict. c. 17—*Charitable Trusts—Recovery* - - - - - 750 *See* CHARITY. 1.

54 & 55 Vict. c. 73, ss. 5, 6—*Mortmain and Charitable Uses* - - - 1 *See* CHARITY. 3.

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55 & 56 Vict. c. 58—*Accumulations* - 285 *See* WILL. 1.

57 & 58 Vict. c. 30, s. 6; s. 8, sub-s. 3; s. 9, sub-s. 1—*Finance* - - - 280 *See* WILL. 8.

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58 & 59 Vict. c. 27, s. 4—*Market Gardeners' Compensation* - - - 388 *See* LANDLORD AND TENANT. 2.

59 & 60 Vict. c. 25, s. 56—*Friendly Societies* *See* FRIENDLY SOCIETY. 2. 476, n.

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60 & 61 Vict. c. 19, ss. 2, 3—*Preferential Payments in Bankruptcy Amendment* *See* COMPANY. 11. 93

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63 & 64 Vict. c. 48, s. 8—*Companies* - 23 *See* COMPANY. 7.

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**STIRPITAL SURVIVORSHIP**—Will — Construction - - - - - 169 *See* WILL. 13.

**SUMMONS**—Married woman — Removal of restraint on anticipation—Petition 221 *See* HUSBAND AND WIFE. 2.

**SUPPORT**—*Easement — Implied Reservation on Conveyance of Tenement alleged to be servient—Enjoyment* clam—*Right to support of Dock Sides by Rods fastened in adjoining Owner's Land.*

In 1861 G. owned in fee simple two adjoining pieces of land (X. and Y.) on the riverside at Blackwall. Plot X. was let to tenants and Plot Y. was in G.'s own occupation. G. in the same year having constructed a graving dock, with wooden sides, on Y., by arrangement with the tenants of X., carried rods or ties through the boundary fence under the surface of X. for about 15 feet, where the rods were fastened to piles by nuts. The rods were not visible on X., nor were the piles or nuts save as below mentioned.

In 1877 both properties were in hand, and G.'s successors in title conveyed X. to the plaintiffs by a deed in common form containing no express reservation of the right of support, and in 1886

**SUPPORT**—*continued.*
G.'s successors conveyed Y. to the defendants' predecessors in title. In 1900 the plaintiffs, in excavating with a view to improving their property, first became aware of the existence of the rods. Two nuts on the outside of piles were also occasionally visible. No ordinary person conversant with riverside property would necessarily have inferred that the nuts supported the dock. For a timber dock as described above it was reasonably necessary to support it by the means actually adopted, but if a concrete wall had been placed on the side nearest X. it would have been unnecessary to place any means of support in X.:—
*Held*, (1) that there was no implied reservation of the right to support when X. was conveyed to the plaintiffs; (2) that the support had been enjoyed *clam*—that is to say, without the plaintiffs' knowledge and not in such a way that their attention ought reasonably to have been drawn to it, although there had been nothing surreptitious or actively concealed—and therefore that no easement had been acquired; and (3) that the plaintiffs were entitled to remove the means of support although the result would be to cause the dock to collapse. UNION LIGHTERAGE COMPANY *v.* LONDON GRAVING DOCK COMPANY
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**SURETY**—Mortgage—Collateral security - 602
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**SURFACE DRAIN**—Sewer—Nuisance by sewage—Drainage of houses—Notice to local authority - - - - 451
*See* SEWERS. 3.

**SURPLUS ASSETS**—Preference shares—Revenue representing dividends never declared
*See* COMPANY. 12, 13. 184, 190, n.

**SURRENDER**—River—"Tolls"—Presumption of lost surrender - - - 671
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—— Shares—Ultra vires—Transaction amounting to sale and purchase - - 265
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**SURVIVORSHIP**—Will—Construction
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**SWIMMING-BATH**—Water supply—School—Charity—Domestic purposes - 813
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**TAXATION**—Costs—Co-defendants—Judgment against one defendant - - 763
*See* PRACTICE. 1.

—— Costs—Debenture-holders' action 357, 377
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—— Costs—Order to tax costs and to include remuneration of receiver—Separate certificate as to costs only - - 652
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—— Costs—Party and party—Special fee to counsel—Disallowance - - 176
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**TENANT**—Landlord and.
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**TENANT FOR LIFE**—Disentailing assurance of money not yet ascertained—Real estate limited in strict settlement - 290
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—— Investment—Proceeds of realization of insufficient security—Apportionment—Remainderman - - - 584
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—— Trustees for purposes of Act—Investment on mortgage—Inquiry into title and value - - - - 790
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**"TESTAMENTARY EXPENSES"**—Estate duty payable in respect of real estate - 280
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**TIMBER**—Administration—Lunacy—Conversion - - - - - 498
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**TIME**—Mortmain—Real estate—Devise—Sale—Extension of time—Jurisdiction - 1
*See* CHARITY. 3.

—— Rectification of register—Lapse of time 265
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**TITHE**—Charge on great tithes—Inclosure Act—Mortgagee—Notice - - 750
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**TITLE**—Covenant for—Breach—Measure of damages—Conveyance - - 825
*See* VENDOR AND PURCHASER. 2.

—— Trust for sale—Leaseholds—Sale by way of underlease - - - - 383
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**TITLE-DEEDS**—Possession of—Purchaser for value without notice—Mortgage—Priority - - - - 231
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**TOLL**—"Toll thorough"—"Toll traverse" 671
*See* RIVER.

**TRADE**—Interference with—Obstruction on highway—Lamp-post—Adjoining owner
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—— Restraint of—Validity—Sale to wholesale trader on contract requiring him to resell on specified terms - - 275
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**TRADE NAME**—Fraudulent purpose—Name of company—Registration—Form of Injunction - - - - 513
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**TRANSFER**—Land—Liability of personal representatives for unknown debts - 463
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**TREES**—Right to remove fruit trees—Compensation - - - - - 388
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**TRESPASS**—Bridge—Liability to repair—Right to repair—Highway—Right to abate nuisance - - - - 518
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**TRUST** — Corporation sole — Rector — Power to hold personalty—Mortmain—Irregular investment in land - - - 487
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—— For sale—Title—Leaseholds—Sale by way of underlease - - - 383
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—— General or specific—Trust affecting conscience of legatee as to part - 372
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**TRUSTEE**—*Breach of Trust—Solicitor Trustee—Fraud — Appropriation — Entries in Books — Declaration of Trust — Mortgage — Leaseholds—"Interest in Land"—Equitable Incumbrancers—Priority — Innocent Trustee Mortgagee — Legal Estate—Title-deeds, Possession of—Purchaser for Value without Notice—Legal Estate acquired by Mortgagee after Notice of Trust—Joint Tenancy—Conveyance by one Joint Tenant — Severance — Equitable Title — Legal Title — Relation back—Notice, Express or Constructive — Solicitor and Client—Notice through Solicitor—Purchaser Mortgagee—General Inquiry as to Incumbrances—Liability of Vendor to answer — Trustee and Cestui que Trust — Conveyancing Act*, 1882 (45 & 46 *Vict. c.* 39), *s.* 3, *sub-s.* 1 (*i.*) *and* (*ii.*).

In 1882 T., a solicitor, advanced money of his own upon the security of leaseholds mortgaged to him by sub-demise.

In 1889, being then one of the two trustees of the B. settlement, he received a sum of money belonging to the settlement, and, without the knowledge of his co-trustee, fraudulently applied it to his own use. By entries in his books, under the heading of the trust, he purported to appropriate his own mortgage debt to answer the sum of which he had defrauded the trust estate, but he never communicated the purported appropriation either to his co-trustee or to his cestuis que trust, all of whom were sui juris.

In 1896 the appropriation became known to one of the cestuis que trust, who was a solicitor and acted as such for the others, but although they had all become absolutely entitled in possession to the trust funds they never called upon the trustees to transfer them, and no inquiry was made respecting the mortgage.

In 1889 T. was also a trustee of the T. settlement. In 1895, T. having then become sole trustee of that setttlement, N. was appointed co-trustee, and at N.'s request, on T.'s representation that the trust funds included the above-mentioned mortgage debt and securities, the representation being supported by his production to N. of the deeds, T. executed a legal transfer thereof into the joint names of himself and N., N. being then totally ignorant of the existence of the B. settlement and of T.'s secret appropriation thereto. The deed of transfer had been prepared by T. as solicitor to the T. trust, and the mortgage and other title-deeds remained in his custody as such solicitor.

In 1897 T., without N.'s knowledge, deposited the deeds with his bankers as security for a debt due from him to them, at the same time executing to them a deed-poll by which he charged the debt upon all his estate and interest in the property comprised in the deeds, and undertook to execute, on request, a legal mortgage; and he

**TRUSTEE**—*continued.*

thereby declared that during the continuance of the security he would hold all his interest thereby charged in trust for the bank as mortgagees; and he appointed three officers of the bank his attorneys for him and on his behalf, and as his act and deed, to execute any such legal mortgage as aforesaid. At that time the bank had no notice of either of the two settlements.

In March, 1898, T. absconded, and in April, 1898, notice was given to the bank of the T. settlement, but they had no notice of the B. settlement. Notwithstanding the notice, the bank purported to execute to themselves by their three officers as T.'s attorneys under the deed-poll a legal mortgage of the leaseholds comprised in the deposited deeds.

In actions to ascertain the priorities of the B. settlement, the T. settlement, and the bank to the benefit of the mortgage debt and securities:—

*Held*, by Vaughan Williams and Stirling L.JJ. (Rigby L.J. dissenting), that there was a good appropriation in 1889 in favour of the B. settlement, though not communicated by T. either to his co-trustee or to his cestuis que trust: *Middleton* v. *Pollock*, (1876) 2 Ch. D. 104; *New, Prance & Garrard's Trustee* v. *Hunting*, [1897] 2 Q. B. 19, affirmed sub nom. *Sharp* v. *Jackson*, [1899] A. C. 419:

But *held* by the full Court that, assuming there was a good appropriation in favour of the B. settlement, N., as trustee of the T. settlement, and having no notice of the appropriation, could not be deprived of the advantage acquired by him as against the B. settlement by the possession of the legal estate in one moiety of the mortgage debt and securities and of the better right to the legal estate in the other moiety which had become vested in the bank through T.'s mortgage to them operating as a severance of the joint tenancy between himself and N.; and that N. must be treated as an innocent purchaser for value without notice, on the ground that by accepting the transfer of the mortgage debt and securities he gave up his right to sue T. for the debt due to the T. settlement: *Thorndike* v. *Hunt*, (1859) 3 De G. & J. 563; *Taylor* v. *Blakelock*, (1886) 32 Ch. D. 560: also that N. was protected by s. 3, sub-s. 1 (i.) and (ii.) of the Conveyancing Act, 1882, from being affected with constructive notice of the appropriation to the B. settlement, because (1) no possible inquiries or inspection by N., or any independent solicitor on his behalf, would have brought the appropriation to the B. settlement to his knowledge, and (2) the appropriation did not "come to the knowledge of" T. either as N.'s solicitor or "in the same transaction in respect to which the question of notice arose";

*Held*, also, that inasmuch as the bank had, at the date of the mortgage to them in April, 1898, notice of the T. settlement, they could not be allowed to gain priority over that settlement by means of the legal estate they had acquired in an undivided moiety of T.'s mortgage debt and securities, their mortgage not relating back to the date of the deed-poll of 1897. Consequently:

*Held*, that N., as trustee of the T. settlement,

**TRUSTEE**—*continued.*

was entitled to the mortgage debt and securities in priority to both the B. settlement and the bank, and the bank was ordered to reconvey to him as such trustee the legal estate vested in them, and to deliver up the deeds accordingly.

Although a mortgage debt is a chose in action, yet, where the subject of the security is land, the mortgagee is treated as having "an interest in land," and priorities are governed by the rules applicable to interests in land, and not by the rules which apply to interests in personalty: *Jones* v. *Gibbons*, (1804) 9 Ves. 407, 410; 7 R. R. 247, 250; and leaseholds are real estate for the purposes of the rule: *Wiltshire* v. *Rabbits*, (1844) 14 Sim. 76; *Union Bank of London* v. *Kent*, (1888) 39 Ch. D. 238.

*Quære*, whether, when the estates of a prior and subsequent incumbrancer are both equitable, the rules as to postponement, in *Northern Counties of England Fire Insurance Co.* v. *Whipp*, (1884) 26 Ch. D. 482, are not excluded: see *Taylor* v. *Russell*, [1892] A. C. 244, 262.

The positions discussed and considered (*a*) of a legal mortgagee making an advance without notice of a prior equitable title: (*b*) of an equitable mortgagee making an advance without notice of a prior equitable title and subsequently getting in the legal estate either with or without notice (as the case may be) of the prior equity: (*c*) of an equitable mortgagee who has allowed his mortgagor, or some person standing in a fiduciary relation to him, the mortgagee, to retain possession of the title-deeds so that they ultimately come into the hands of a subsequent equitable incumbrancer: and (*d*) of a purchaser for value of an equitable title without notice, as regards his right to call for the legal estate. TAYLOR *v.* LONDON AND COUNTY BANKING COMPANY. LONDON AND COUNTY BANKING COMPANY *v.* NIXON - - - - C. A. 231

2. —— *Management — Powers — Business — Shares in Limited Company — Administration — Trustees — Trust Estate — Investment — Reconstruction Scheme — Concurrence of Trustees — Exchange of Shares of old Company for Shares in new — Cestuis que Trust, Interests of — Parties under Disability — Realization of Shares — Retainer of Shares — Sanction of Court — Jurisdiction.*

Where in the administration or management of a trust estate by the trustees, especially where the estate consists of a business or of shares in a mercantile company, there arises an emergency or a state of circumstances which it may reasonably be supposed was not foreseen or anticipated by the author of the trust and is unprovided for by the trust instrument, and which renders it desirable and perhaps even essential, in the interests of the beneficiaries, that certain acts should be done by the trustees which they themselves have no power to do, and to which the consent of all the beneficiaries cannot be obtained by reason of some not being sui juris or not yet in existence, the Court will exercise its general administrative jurisdiction by sanctioning, on behalf of all parties interested, those acts being done by the trustees.

Thus, the Court authorized the trustees of three separate trust instruments to concur in a

**TRUSTEE**—*continued.*

shareholders' scheme for the reconstruction of a prosperous limited company, shares in which, settled by the settlor or testator in each case, had become vested in the trustees, it being proposed that all the shareholders in the existing company should exchange their shares, all of which were fully paid, for more realizable shares (fully paid) and debentures in the proposed new or reconstructed company. The evidence shewed that the scheme would be greatly to the advantage of all parties interested under the several trusts, including infants and unborn persons. In one of the three cases the trustees had power, under the trust instrument, to invest in shares or debentures of such a company as the proposed new company. In the two other cases, as the trustees had no such power, the Court put them on an undertaking to apply for leave to further retain the shares and debentures they would obtain under the scheme, if they desired to retain them beyond one year from the time the reconstruction should be carried into effect.

*In re Crawshay*, [1888] W. N. 246, 251; 60 L. T. 357, and *In re Morrison*, [1901] 1 Ch. 701, considered. *In re* NEW. *In re* LEAVERS. *In re* MORLEY - - - - C. A. 534

3. —— *Management — Trust Estate — Investment — Discretion as to the Time for Converting into Money the Personal Estate of Testator invested in Stocks, Shares, and other Investments — Costs.*

The Court recommended the applicants, the trustees of the will and codicils of the testator, to sell gradually, and under the advice of such stockbrokers or stockbroker as they may think fit to employ, the whole of the sums of railway stock, together with any other stocks of those railways, not being debenture stocks, which have been allotted to and taken up by the trustees for the time being of the will and codicils. But the Court being of opinion that, according to the true construction of the will and codicils, the trustees for the time being thereof have an absolute discretion as to the time for converting into money the personal estate of the testator invested in stocks, shares, and other investments at the time of his decease, doth not think fit to interfere with such discretion by giving any directions. Costs of all parties to be taxed as between solicitor and client and to be raised and retained by the trustees out of the testator's residuary personal estate. *In re* HARGREAVES. HICK *v.* HARGREAVES - - Kay J. 547, n.

—— Debenture-holders' action — Trustees' costs —Same solicitor appearing for trustees and company - - - 377
*See* COMPANY. 1.

—— Maintenance and education — Annuity to widow for benefit of infants—Death of widow—Annuity continued - - 438
*See* WILL. 12.

—— Representation — Future rights—Unascertained persons - - - 479
*See* FINES AND RECOVERIES. 1.

—— Tenant for life—Trustees for purposes of Act—Investment on mortgage—Inquiry into title and value - - 790
*See* SETTLED LAND. 1.

**ULTRA VIRES**—Surrender of shares—Transaction amounting to sale and purchase *See* COMPANY. 8. 265

**UNCERTAINTY** — Remoteness — Illegality — Statutory confirmation - - 37 *See* CONTRACT. 1.

**UNDERLEASE**—Title—Trust for sale — Leaseholds—Sale by way of underlease 383 *See* VENDOR AND PURCHASER. 8.

**UNDERWRITERS**—Shares, Issue of—Payment of commission for placing shares—Underwriting agreement - - - 23 *See* COMPANY. 7.

**UNITY OF POSSESSION**—Way—User — Interruption — Acquisition of right against reversioner - - - - 350 *See* WAY, RIGHT OF. 3.

**USER**—Way—Prescription. *See* Cases under WAY, RIGHT OF.

**VENDOR AND PURCHASER**—*Contract—Enjoyment of Light—Deed of Acknowledgment—Non-disclosure — Specific Performance—Compensation —Costs.*

A contract for the sale of a house with windows looking over the land of a third person implies no representation or warranty that the windows are entitled to the access of light over that land, or even that the prescriptive period is running, and consequently the non-disclosure of a deed acknowledging that the vendor is not entitled to that light is no ground for refusing the vendor specific performance, or allowing the purchaser compensation, though it may be a ground for depriving the vendor of his costs.

There is no such thing known to the law as an inchoate easement.

*Bonner* v. *Great Western Ry. Co.*, (1883) 24 Ch. D. 1, followed. GREENHALGH *v.* BRINDLEY **Farwell J. 324**

2. —— *Conveyance — Convenant for Title — Breach—Measure of Damages—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 7.

By an indenture of conveyance, dated in 1898, the defendant as beneficial owner granted to the plaintiff, his heirs and assigns, certain land subject to specified rights of way over a road forming part of the property which had been previously granted by the defendant to other persons. The land was bought and sold for building purposes, and the plaintiff having built a house thereon discovered that, in addition to the rights of way specified in the conveyance, there existed a further right of way over the road, which had been granted by the defendant in 1891 to another person and was innocently undisclosed by him.

In an action for damages for breach of the covenant for title implied by s. 7 of the Conveyancing Act, 1881:—

*Held*, that the breach was single, entire, and complete upon the execution of the conveyance; and that the proper measure of damages was the difference between the value of the property as it purported to be conveyed, and its value as the vendor had power to convey it. TURNER *v.* MOON **Joyce J. 825**

3. —— *Leaseholds—Sale by Private Contract —"The Vendor's Title is accepted by the Purchasers"—Onerous Covenants — Duty of Vendor to disclose—Rescission.*

It is settled that a vendor of leasehold property must disclose the existence of onerous and unusual covenants, or at least afford the purchaser an opportunity of inspecting the leases.

An agreement for the sale of certain leasehold houses contained the following stipulation: "The vendor's title is accepted by the purchasers." The leases under which the property was held contained onerous and unusual covenants the existence of which had not been disclosed by the vendor before the contract was entered into, and of which the purchasers had no notice:—

*Held*, that the condition as to the acceptance of the title did not affect the vendor's general duty of disclosure, and the purchasers were entitled to rescind the contract and to have the deposit returned with interest. *In re* HAEDICKE AND LIPSKI'S CONTRACT - **- Byrne J. 666**

4. —— *Specific Performance — Costs—Equitable Set-off—Debts "en autre Droit."*

The plaintiff, as purchaser of leasehold property, obtained judgment for specific performance against the defendant, as administratrix of an intestate, with costs to be paid by her personally. The defendant had a beneficial interest, to the extent of one-fourth, in the intestate's estate, and it was alleged that except a mortgage there were no unpaid debts of the intestate, and that the purchase-money payable by the plaintiff represented the whole of the intestate's estate. The judgment not having been passed and entered, the plaintiff moved for the addition of a direction enabling him to deduct the costs due to him from the defendant from so much of the purchase-money as represented her beneficial interest in the intestate's estate:—

*Held*, that without some form of administration order, which the Court had no power to make in this action, it was impossible to ascertain what the amount representing the beneficial interest of the defendant was, so as to bind other persons interested in the intestate's estate; and, distinguishing *Green* v. *Sevin*, (1879) 13 Ch. D. 589, that, though a set-off of costs against purchase-money might be allowed in a case where the debt due to and the debt due from the vendor were so due in the same capacity, the plaintiff here could not be allowed to bring into account all or any part of an unascertained sum to which the defendant might be beneficially entitled in the administration of her intestate's estate, as against the purchase-money which was due to her in her representative capacity. PHILLIPS *v.* HOWELL - - - **Byrne J. 773**

5. —— *Voidable Contract—Assignment of Contract—Money had and received.*

A contract of sale was induced by and voidable for misrepresentations made by the vendor. The vendor assigned the benefit of the contract, and payments made as under the contract by the

VENDOR AND PURCHASER—*continued.*

purchaser, before he elected to avoid it, were received by the vendor's assignee. The assignee sued for specific performance, making the vendor and purchaser defendants; the action was dismissed:—

*Held*, that the purchaser could recover his payments by counter-claim as on a total failure of consideration.

*Aberaman Ironworks* v. *Wickens*, (1868) L. R. 5 Eq. 485; 4 Ch. 101, explained on the ground that the Court of Chancery then had no jurisdiction to deal with a legal claim for money had and received. FLEMING *v.* LOE

Cozens-Hardy J. 594

6. —— *Sale by the Court—Conditions of Sale — Mistake — Misdescription — Compensation — Defect of Title—Rescission after Conveyance.*

On a sale by the Court of property described in the particulars as freehold stabling with dwelling rooms over, one of the conditions provided that if any error or misstatement should appear to have been made in the particulars of sale or conditions, it should not annul the sale, but compensation, to be settled by the judge in chambers, should be made in respect thereof: the property was conveyed to the plaintiff, the purchaser, in October, 1897, and the purchase-money was paid into court, and the bulk of it distributed among the beneficiaries. A year after completion it was discovered that some of the dwelling rooms over and a cellar underneath a portion of the property belonged to third persons, and the plaintiff eventually had to pay 300*l.* to acquire a title to these dwelling rooms. In February, 1900, the present action was commenced against the vendor trustee and the beneficiaries, claiming compensation for the errors and misstatements in the particulars and conditions of sale, or, in the alternative, to set aside the sale on the ground of common mistake, and obtain repayment of the purchase-money:—

*Held*, that the plaintiff was not entitled to compensation under the above condition of sale, which did not, and was not intended to, apply to the case of a defect of title, but only to error or misstatement in the subject-matter of the sale; that, even assuming there had been a common mistake, and assuming that there need not be a total failure of consideration to justify rescission after conveyance, the error made in the present case was not sufficient to justify rescission, and that the plaintiff's action therefore failed and must be dismissed. DEBENHAM *v.* SAWBRIDGE

Byrne J. 98

7. —— *Specific Performance against Vendor's Trustee in Bankruptcy — Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 55—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 13.

Specific performance may be enforced against the trustee in bankruptcy of a vendor of property, and, if the property is leasehold, he cannot disclaim the contract without disclaiming the lease.

*Holloway* v. *York*, (1877) 25 W. R. 627, distinguished. PEARCE *v.* BASTABLE'S TRUSTEE IN BANKRUPTCY - - - Cozens-Hardy J. 122

8. —— *Title—Trust for Sale—Leaseholds—Sale by way of Underlease—Vendor's Summons—Rescission of Contract—Return of Deposit—Jurisdiction—Vendor and Purchaser Act*, 1874 (37 & 38 *Vict. c.* 78), *s.* 9.

Trustees for sale put up for sale by auction in lots leasehold property comprised in a single lease (of which they were the assignees) subject to a condition that in the event of the lots being sold to different purchasers (which happened) the sale of each lot should be by way of underlease for the whole of the term, less one day, at an apportioned rent:—

*Held*, not a valid exercise of the trust for sale.

The Court has jurisdiction upon a vendor's summons under the Vendor and Purchaser Act, 1874, to make an order for rescission of the contract and return of the deposit.

So *held* on the authority of *In re Higgins and Percival*, (1888) 59 L. T. 213. *In re* WALKER AND OAKSHOTT'S CONTRACT - Kekewich J. 383

—— Indemnity—Partnership—Sale of share—Vendor's right to indemnity - 620
*See* PARTNERSHIP. 2.

—— Purchaser mortgagee—General inquiries to incumbrances—Liability of vendor to answer - - - - 231
*See* TRUSTEE. 1.

VOLUNTARY ASSOCIATION — Corps of Commissionaires, Bequest to committee of—Charity—Perpetuity - - 110
*See* WILL. 4.

WATER — *Water Supply — Swimming Bath — School — Charity — Domestic Purposes — "Trade, Manufacture, or Business"—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 35, 53—*Waterworks Clauses Act*, 1863 (26 & 27 *Vict. c.* 93), *s.* 12—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 51, 56, 57.

The governors of a school carried on as a charity and not for purposes of profit constructed a swimming bath for the use of the scholars. A swimming instructor was kept and fees were charged:—

*Held*, that the school was for certain purposes a business, but that the water supplied to the swimming bath was supplied for domestic purposes within s. 12 of the Waterworks Clauses Act, 1863, and not for a "trade, manufacture, or business." BARNARD CASTLE URBAN DISTRICT COUNCIL *v.* WILSON - - Buckley J. 813

—— Preferential payments in bankruptcy—Poor and district rates—Water rate payable by meter—Apportionment - 93
*See* COMPANY. 11.

—— Several fishery—"Weirs"—Non-tidal, non-navigable, waters - - - 401
*See* FISHERY.

WATERCOURSE—*Artificial Channel—Temporary Purpose — Severance of Tenements — Precarious Easement — Implied Grant — Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 6.

A watercourse constructed for the purpose of a mill is constructed for a temporary purpose

**WATERCOURSE**—*continued.*
within *Arkwright* v. *Gell*, (1839) 5 M. & W. 203, and similar authorities.

A precarious easement is unknown to the law.

The owner of an ancient mill and a farm the cattle whereof were to some extent watered at an ancient watercourse diverted from a natural stream, and running on the mill property alongside the farm, but constructed and maintained solely for the purpose of the mill, conveyed the farm to a purchaser without mentioning any water right:—

*Held*, that, having regard to the special temporary purpose for which the watercourse was constructed, the expense of maintaining it, and the fact that it lay entirely on the mill property, the purchaser had acquired no right, either by implied grant or under the general words of the Conveyancing Act, 1881, s. 6, to have it continued for his benefit, and the watercourse being therefore precarious, he could have no right to the use of the water (if any) therein.

*Birmingham, Dudley and District Banking Co.* v. *Ross* (1888) 38 Ch. D. 295, followed and applied.

*Watts* v. *Kelson*, (1871) L. R. 6 Ch. 166, distinguished. BURROWS *v.* LANG **Farwell J. 502**

**WAY, RIGHT OF** — *Prescription — Easement — Forty Years' User—Consideration—Annual Payment — Licence — Parol Agreement — Evidence — Inference from Facts—Indefeasible Right—"Enjoyment as of Right"—Lost Grant—Prescription Act*, 1832 (2 & 3 *Will.* 4, *c.* 71), *ss.* 2, 5.

For upwards of sixty years the plaintiff and her predecessors in title had openly and regularly used a cart-way to their messuage across the yard of the adjoining premises of the defendants and their predecessors in title. There was nothing in writing to shew how the user originated, but at the end of each year, for at least the last forty years of the period, a sum of 15*s.* had been regularly paid by the plaintiff and her predecessors to the defendants and their predecessors, though the origin and precise object of the payment were unknown. The plaintiff said (though this was not proved) that it was an annual contribution towards the repair of the way, whereas the defendants said it was rent for the use of the way for the year preceding the payment. The only writing in existence and produced relating to the payment was a receipt, given by the defendants to and accepted apparently without protest by the plaintiff, for the last payment before action—but after disputes had arisen between the parties as to the right to use the way—stating that it was for "right of way" for the preceding year. The defendants having threatened to close the way, the plaintiff brought an action to establish her right of way through the defendants' yard:

*Held*, by Vaughan Williams and Romer L.JJ., that the proper inference to be drawn from the payment of the 15*s.* at the end of each year was that it was a payment for a licence for the user of the way during the preceding year, and that such payment was sufficient to negative an enjoyment of the way by the plaintiff and her predecessors "as of right" for the full period of forty years under ss. 2 and 5 of the Prescription Act,

**WAY, RIGHT OF**—*continued.*
1832 (2 & 3 Will. 4, c. 71); also, that the facts did not support the presumption of a lost grant. But

*Held*, by Rigby L.J., that the above inference was not necessarily to be drawn from the payment of the 15*s.*; and that since no agreement, verbal or otherwise, for that payment as consideration for the right of way had been proved to have been made within the forty years, and any verbal agreement before the commencement of that period could not control the right of way actually enjoyed during that period, an absolute and indefeasible right of way must be deemed to have been acquired and enjoyed "as of right" under the statute.

Decision of Cozens-Hardy J., [1901] 1 Ch. 592, reversed.

*Plasterers' Co.* v. *Parish Clerks' Co.*, (1851) 6 Ex. 630, and *Tickle* v. *Brown*, (1836) 4 Ad. & E. 369; 43 R. R. 358, discussed. GARDNER *v.* HODGSON'S KINGSTON BREWERY COMPANY **C. A. 198**

2. —— *Injunction—Public Footway—Private Carriage-way along the same Line—Width of Footway—Presumption—Dedication.*

Where there is a public footway, and adjacent land along the same line as the footway, but increasing the width, is laid out by the owner of the soil as a way for carriage traffic, even for private carriage traffic, the presumption of law, in the absence of evidence to the contrary, is that the owner has dedicated to public use as a footway all the space that he has devoted to traffic in fact. ATTORNEY-GENERAL *v.* ESHER LINOLEUM COMPANY - - - **Buckley J. 647**

3. —— *Unity of Possession—Easement—User — Interruption — Acquisition of Right against Reversioner—Prescription Act*, 1832 (2 & 3 *Will.* 4 *c.* 71), *ss.* 2, 4.

The plaintiffs, being respectively the owner in fee and the tenant of Whiteacre, brought an action of trespass against the owner and occupier of the adjoining farm Blackacre, in driving a horse and cart from Blackacre across certain fields belonging to Whiteacre. The defendant set up a private right of way under the Prescription Act, 1832, and alleged an uninterrupted user for forty years. It appeared that A. was tenant of Whiteacre from 1860, and of Blackacre from 1877, till 1898:—

*Held*, (1.) following *Onley* v. *Gardiner*, (1838) 4 M. & W. 496; 51 R. R. 704, and *Battishill* v. *Reed*, (1856) 18 C. B. 696, that the unity of possession of the alleged servient and dominant tenements for the greater part of the forty years preceding the action was fatal to the defendant's claim under the Act; (2.) following *Baxter* v. *Taylor*, (1832) 4 B. & Ad. 72; 38 R. R. 227, that in the circumstances the user of the right of way for the last forty years would be no evidence of right as against the plaintiffs. DAMPER *v.* BASSETT - - - - **Joyce J. 350**

—— "Weirs"—Adverse acts of ownership—Incorporeal right - - - 401
*See* FISHERY.

"WEIRS"—Ownership of soil—Presumption
*See* FISHERY. 401

WIFE.
*See* HUSBAND AND WIFE.

WILL—*Accumulation—Direction to accumulate—Purchase of Real Estate—"For the Purchase of Land only"—Accumulations Act*, 1892 (55 & 56 *Vict. c.* 58)—*Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63), *s.* 3.

A direction to accumulate for the purchase of real estate is a direction to accumulate "for the purchase of land only" within the meaning of the Accumulations Act, 1892, and is consequently void.

The definition of "land" in s. 3 of the Interpretation Act, 1889, is not confined to corporeal hereditaments.

Dictum of Chitty J. in *In re Danson*, (1895) 13 The Reports, 633, considered and questioned. *In re* CLUTTERBUCK. FELLOWES *v.* FELLOWES Byrne J. 285

2. —— *Ademption—Gift by Will to Testator's Daughter—Direction to settle Part of Legacy—Subsequent Settlement upon Daughter by Testator during his Lifetime—Different Amount—Different Limitations—Ademption pro tanto of Settled Portion of Legacy.*

Testator by his will, dated in 1885, gave to his daughter on attaining twenty-five or marriage the sum of 20,000*l.*, and directed that 15,000*l.*, part thereof, should be settled upon her and her children. In 1893 the daughter married, and the testator then settled upon her and her children, by deed, 7300*l.* Consols upon trusts differing from those declared by the will in respect of the 15,000*l.* Upon the death of the testator in 1900:—

*Held*, that the 7300*l.* Consols must be taken as an ademption pro tanto of the 15,000*l.* *In re* FURNESS. FURNESS *v.* STALKARTT Joyce J. 346

3. —— *Class, Gift to a—Gift over on Death coupled with a Contingency—"Die leaving Issue"—Divesting—Period of Defeasibility—Construction of Will.*

A testator gave his residuary estate upon trust for his widow for life or widowhood, and after her decease or second marriage to apply the income in the maintenance and education of his children until the youngest who should be living being a son should attain twenty-one, or being a daughter attain that age or marry. Subject thereto he directed that the trust fund and the income thereof, and any accumulations not vested or applied under his will, should be held in trust for all his children who being sons should attain twenty-one, or being daughters should attain that age or marry, to whom he gave his residuary estate in equal shares. And he directed that if any of his children should die leaving issue, such issue should take his or her deceased parent's share equally as tenants in common:—

*Held*, that there was nothing in the will to limit the contingency of death leaving issue to less than the whole life of the first taker, whether son or daughter; and that the divesting clause or gift over might operate, not only during the lifetime of the testator's widow, but also after her death:

*Held*, therefore, that children who survived the testator only took vested indefeasible interests if and when they should die without leaving issue. *In re* SCHNADHORST. SANDKUHL *v.* SCHNADHORST - - - Joyce J. 338

4. —— *Commissionaires, Bequest to Committee of Corps of—Voluntary Association—Charity—Perpetuity.*

Bequest "to the committee for the time being of the Corps of Commissionaires in London to aid in the purchase of their barracks, or in any other way beneficial to that corps."

The corps was founded shortly after the Crimean War in order to find employment for discharged and disabled soldiers and sailors, and was entirely self-supporting. As the corps increased, buildings were from time to time acquired for the purpose of providing quarters for the men and for carrying on the business of the corps. It became necessary to employ a staff, and an endowment fund was started, being designed for the payment of officers, staff, and such other objects connected with the institution as might at the discretion of the committee require assistance. The management and property of the corps were vested in a board of governors composed of two permanent trustees, an administrative board of eighteen officers, and an executive committee of seven:—

*Held*, that, if and so far as the objects of the institution were charitable, the gift was good; and if and so far as they were not charitable, still it was a good gift, and did not tend to create a perpetuity.

*In re Dutton*, (1878) 4 Ex. D. 54; *In re Amos*, [1891] 3 Ch. 159; *In re Clark's Trust*, (1875) 1 Ch. D. 407; *Thomson* v. *Shakespear*, (1860) 1 D. F. & J. 399; and *Carne* v. *Long*, (1860) 2 D. F. & J. 75, distinguished.

*Cocks* v. *Manners*, (1871) L. R. 12 Eq. 574; *Morrow* v. *M'Conville*, (1883) 11 L. R. Ir. 236; *In re Wilkinson's Trusts*, (1887) 19 L. R. Ir. 531; and *Bradshaw* v. *Jackman*, (1887) 21 L. R. Ir. 12, discussed, and the principle laid down in those cases followed. *In re* CLARKE. CLARKE *v.* CLARKE Byrne J. 110

5. —— *Contingent Interest—Accumulation.*

The proceeds of a trust for sale and conversion were given by will to such of the children of a married woman as should attain twenty-one, or being daughters attain that age or marry, with a gift over. There was, in the events which had happened, no express disposition of the income. The married woman was forty-six years old and childless. The Court directed the income to be accumulated for twenty-one years from the testator's death or until the gift over took effect.

*Green* v. *Tribe*, (1878) 47 L. J. (Ch.) 783; 27 W. R. 39, not followed. *In re* TAYLOR. SMART *v.* TAYLOR - - - Cozens-Hardy J. 134

6. —— *Estate Duty—Incidence—Exercise of General Power of Appointment by Will—Appointed Fund—Residue—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 9, *sub-s.* 1.

Where a general power of appointment over a fund is exercised by will, the appointed fund does not pass to the executor "as such," and consequently the estate duty in respect thereof is payable out of the appointed fund in the absence of any direction in the will to the contrary.

*In re Moore*, [1901] 1 Ch. 691, dissented from.

**WILL**—*continued.*

*In re Treasure*, [1900] 2 Ch. 648, and *In re Maddock*, [1901] W. N. 118, followed. *In re* POWER. *In re* STONE. ACWORTH *v.* STONE
Byrne J. 659

—— Estate duty — Incidence — Will exercising power of appointment—Appointed fund —Residue - - - - 372
*See* ADMINISTRATION. 2.

7. —— "*Estate Duty*" — *Settlement Estate Duty—Direction to Pay Estate Duty out of Residuary Personalty—Construction of Will.*

A testatrix by a will made in 1899 settled certain real property upon several persons in succession, and directed her trustees to stand possessed of her residuary personal estate upon trust to pay (amongst other things) the estate duty on the whole of the real and personal estate devised and bequeathed by her will:—

*Held*, that "estate duty" included settlement estate duty. *In re* LEVERIDGE. SPAIN *v.* LEJOINDRE - - - - Joyce J. 830

8. —— *Estate Duty payable in respect of Real Estate*—"*Testamentary Expenses*"—*Construction of Will—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 6; *s.* 8, *sub-s.* 3; *s.* 9, *sub-s.* 1—*Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *s.* 1.

Estate duty payable in respect of real estate is not a "testamentary expense" within the meaning of a direction contained in the will of a testator, who died after the Land Transfer Act, 1897, for payment of his debts, funeral and testamentary expenses, out of his personal estate.

*In re Palmer*, [1900] W. N. 9, followed. *In re* SHARMAN. WRIGHT *v.* SHARMAN
Kekewich J. 280

9. —— *Illegitimate Children — Class Gift — Construction of Will.*

A testatrix bequeathed her residuary estate in trust equally for all such of the children being daughters of her nephew R., her niece Mrs. A., and her niece Mrs. H., as should attain twenty-one or marry under that age, each child to be paid her share on attaining that age or marrying under it. At the date of the will and of the testatrix's death the nephew R. was cohabiting with a woman reputed to be his wife, and there was issue of this union three daughters, two born before the date of the will, and one born after the date of the will, but before the date of the death. The nieces had several daughters, one of whom had attained twenty-one at the date of the testatrix's death. The testatrix had always spoken of R.'s reputed wife as his wife, and the three daughters as their children, there being no suspicion of illegitimacy. Upon the arrival of the time for the final distribution of the estate it was discovered that R. did not marry his reputed wife until some years after the death of the testatrix:—

*Held*, that the two children born before the date of the will were entitled to participate, but that the child born afterwards was not entitled.

*Holt* v. *Sindrey*, (1868) L. R. 7 Eq. 170, and *Hill* v. *Crook*, (1873) L. R. 6 H. L. 265, discussed. *In re* DU BOCHET. MANSELL *v.* ALLEN
Joyce J. 441

10. —— *Illegitimate Children — Gift to* **WILL**—*continued.*

*Children Nominatim — Gift to Next of Kin of Children—Construction of Will.*

A testator gave a legacy to each of his seven children by name, and directed that after the death of his wife his residuary estate should be held upon trust for such of his seven children thereinbefore named as should be then living and should attain twenty-one; and he directed his trustees to retain the legacy and the share of residue which any daughter might take under the will, and to hold the same upon trust to pay the income to the daughter for life, and then to her husband for life if she should so appoint, and subject thereto in trust for her children, and in default of children in trust for the persons who at the death of such daughter would have been entitled to such share under the Statutes of Distribution in case she had died possessed thereof without having been married. It was ascertained from the testator's widow that three of the children were borne by her to the testator before her marriage:—

*Held*, that the share of an illegitimate daughter who died without having exercised her power of appointment in favour of her husband and without having had any issue did not pass to those who would have been her next of kin if she had been legitimate, but passed to her legal personal representative as if it had been absolutely bequeathed to her.

*In re Standley's Estate*, (1868) L. R. 5 Eq. 303, followed.

Dictum of Stirling J. in *In re Deakin*, [1894] 3 Ch. 565, 573, not followed. *In re* WOOD. WOOD *v.* WOOD - - Kekewich J. 578

11. —— *Lease — Devise of Real Estate — Construction of Will.*

A testator devised "all my real estate" to one, and bequeathed "all my leasehold estate" to others. He died entitled to the fee simple of certain houses in fee subject to a term, and also entitled to a sub-lease of them for the term less two days outstanding in a mortgagor. He had other freeholds and leaseholds:—

*Held*, that all the testator's interest in the houses passed by the devise. *In re* GUYTON AND ROSENBERG'S CONTRACT - Cozens-Hardy J. 591

12. —— *Maintenance and Education—Annuity to Widow for Benefit of Infants—Trustee—Death of Widow—Annuity continued — Construction of Will.*

A "further annuity" of 300*l.* given by a testator to his widow, for the maintenance and education of his infant daughter, does not cease to be payable by reason of the death of the widow during the minority of the daughter. *In re* YATES. YATES *v.* WYATT Byrne J. 438

13. —— "*Surviving*" — "*Other*"—*Stirpital Survivorship—Construction of Will.*

A testatrix gave one-third of the income of a fund to her daughter M. for life, and after her death one-third of the capital of the fund to all the children of M. whom she might leave surviving who should attain twenty-one in equal shares, and she made similar gifts of the other two-thirds to her daughters C. and E. and their children. And in case of the decease of any of her said three daughters without leaving lawful

WILL—*continued.*
issue surviving who should attain twenty-one, the testatrix gave the income of the share of the fund thereby given to her said daughters so dying to her surviving daughters in like manner as the income thereinbefore given to them for their respective lives, and after their decease she gave the capital to the children of her said surviving daughters who should attain twenty-one per stirpes; and there was an ultimate gift over of the fund in case of the decease of all the daughters without either of them leaving lawful issue who should attain twenty-one. C. died first, leaving her surviving two children, who attained twenty-one, but died in the lifetime of E., the last surviving daughter; M. died next, leaving her surviving two children who attained twenty-one and were still living. E. died last without leaving any issue her surviving. Upon the question who became entitled to E.'s share :—

*Held*, that, having regard to the ultimate gift over, the word "surviving" in the gift to the children of the testatrix's surviving daughters could not be read literally, but that it ought to be construed, not as "other," but as "surviving in stock," and that the children of M. were alone entitled to participate.

Dictum of Cotton L.J. in *Lucena* v. *Lucena*, (1877) 7 Ch. D. 255, 269, approved and followed.

*O'Brien* v. *O'Brien*, [1896] 2 I. R. 459, not followed. *In re* BILHAM. BUCHANAN *v.* HILL. Joyce J. 169

14. —— "*Survivor*"—*Intestacy*—*Construction of Will.*

A testator bequeathed shares of personal estate on trust for his three sons for their respective lives and their children and remoter issue born in their respective lifetimes. He directed that, in case any of his sons should have no issue who should attain a vested interest in the share of their father, that share should be held in trust for the testator's surviving sons and their issue in the like manner as their original shares. Two sons died leaving issue who attained vested interests. The third son survived them, and died without having had a child :—

*Held*, that there was an intestacy as to his share.

The third rule in *In re Bowman*, (1889) 41 Ch. D. 525, dissented from. HARRISON *v.* HARRISON - - Cozens-Hardy J. 136

15. —— *Survivor*—"*Surviving*"—*Construction of Will.*

A testator by his will gave seven portions of his real and leasehold property in trust for his seven children for their respective lives, and upon their respective deceases upon trust to convey to their respective children then living as tenants in common absolutely, provided always that, in the event of any of the testator's children dying without leaving children entitled to take under the will, the shares of such children, both original and accruing under the present clause, should go to their then surviving brothers and sisters, if more than one, as tenants in common for their respective lives, and after their respective deceases to their respective children in the manner thereinbefore provided with respect to is said children's original shares; and if there

WILL—*continued.*
should be but one such surviving brother or sister, then to him or her absolutely. Of the seven children (all of whom survived the testator), three sons died without issue, then a fourth son died leaving children him surviving, then a daughter died without issue :—

*Held*, that the word "surviving" ought to bear its natural meaning, and that the children of the deceased son were not entitled to participate in the daughter's share.

*Semble*, there is no such rule of construction as that thirdly stated by Kay J. in *In re Bowman*, (1889) 41 Ch. D. 525, 532.

*Harrison* v. *Harrison*, [1901] 2 Ch. 136, approved. INDERWICK *v.* TATCHELL. TATCHELL *v.* TATCHELL. INDERWICK *v.* INDERWICK C. A. 738

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LONDON:
PRINTED BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET, S.E., AND GREAT WINDMILL STREET, W.

T 20 JAN 1993